

DEFENDING BATTERED WOMEN

A MANUAL FOR CRIMINAL DEFENSE LAWYERS



A project of the Women's Advocacy Project

Funded by the Texas Bar Foundation

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A project of the Women's Advocacy Project, Inc.
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Women's Advocacy Project, Inc.

The Women's Advocacy Project, Inc. is a statewide, nonprofit, legal organization with a mission to provide free legal advice, expand legal education, and promote access to justice for Texas women in need.

The Women's Advocacy Project was established in 1982 to respond to the needs of countless women across Texas with questions about their legal rights. Today, the women and children of Texas still have a great need for these services.

The Project's activities are organized into six major program areas:

1. Family Violence and Legal Line & General Legal Hotline

Project attorneys answer statewide toll-free legal hotlines and provide assistance to women on a variety of legal concerns including domestic violence, family law issues, consumer problems, housing disputes and employment discrimination.

2. Emergency Legal Services Center

Center attorneys represent survivors of domestic abuse in family law cases when other service providers have turned them away and they cannot afford to hire a private attorney.

3. Family Violence Protection Team

Project attorneys help victims of domestic violence obtain emergency and long term protective orders. Team partners include the Austin Police Department, Travis County Sheriff's Department, Legal Aid of Central Texas, Travis County Attorney's Office, SafePlace, and the Women's Advocacy Project.

4. Emergency Advocacy Hotline

The Project's Advocate assists survivors of domestic abuse, Texas shelters, and other service providers with in-depth problem solving of the various complicated issues that affect battered women's safety and security.

5. Pro Se Protective Order Program

Developed by the Project in 1994, the Pro Se Protective Order packet primarily serves rural and Spanish-speaking women who don't have the resources to retain a private attorney and are unable to obtain services in their area. Each year hundreds of women are empowered to take the first step towards ensuring their safety and their children's safety by obtaining a protective order.

6. Battered Women Defendants Project

The Battered Women Defendants Project provides training, case planning, and technical assistance to Texas trial lawyers who are representing domestic violence survivors as defendants in criminal actions. This year the Project is producing a resource manual that will be distributed to trial attorneys statewide.

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DEFENDING BATTERED WOMEN: A MANUAL FOR CRIMINAL DEFENSE ATTORNEYS

INTRODUCTION AND ACKNOWLEDGMENTS

This manual is intended to be a guide for Texas criminal defense lawyers whose clients, or potential clients, are battered women who are accused of a crime. It may also be useful as a reference tool for investigators working with criminal defense attorneys, as well as other professionals involved in the defense of battered women faced with criminal charges. This is not an exhaustive manual, nor is it intended to provide guidance for the entire range of criminal offenses that victims of abuse could face. It should, however, assist the Texas practitioner in preparing his/her defense when the client has a history of abuse.

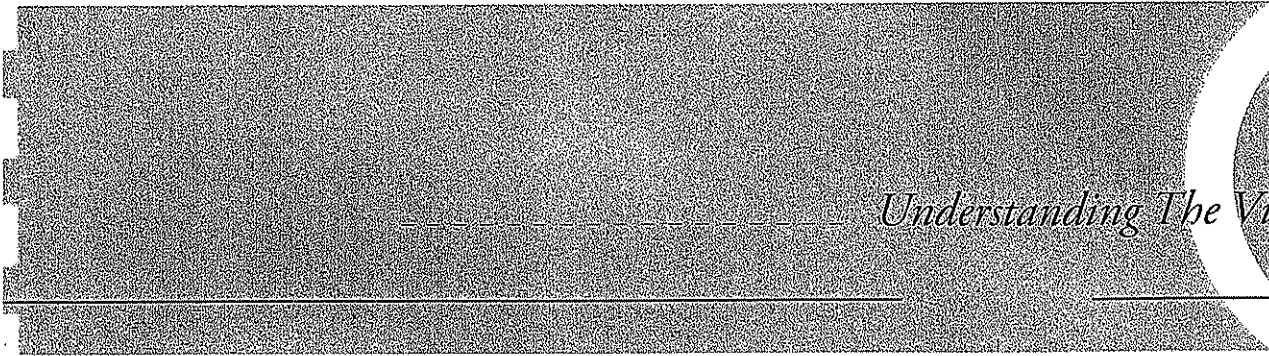
A fundamental premise in the text is that the majority of victims of physically abusive relationships are women, which is explored in the first chapter. Therefore the pronouns used when referring to the victim/client are virtually all female. It is written exclusively for Texas criminal defense lawyers, and while some federal statutes are explored, the material relies heavily on Texas statutes and case law research.

There are several questions practitioners may seek to answer when dealing with any new or prospective female clients. First, does the prospective client have a history of abuse? Determining the answer to this question may not be straightforward, and suggestions for initial client interviews are made in an appendix. Suffice it to say that if there is a history of abuse in the prospective client's past, this manual argues that such a history may be critical for the attorney to understand in order to adequately prepare his or her defense. If there is a history of abuse, the next question the attorney should pose is: How is the abuse relevant to a defense claim? This is as much a strategic question as it is a legal one. And finally, how does the history of abuse in this specific instance inform the defense attorney's theory of the case? The "answers" to these questions are not found in this manual, as they are specific to each unique client and case that comes to the attorney.

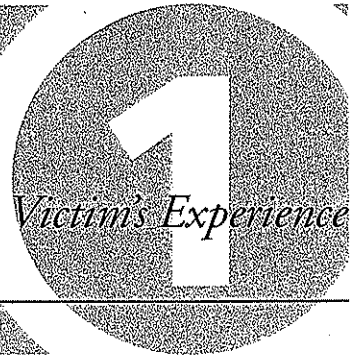
The manual is organized into four chapters. The first chapter offers an overview of the incidence of domestic violence in this country, and includes Texas-specific statistics; it provides insight into the dynamics of an abusive relationship; and it offers suggestions for determining whether or not a client has a history of abuse. Chapter two offers an outline of Texas crimes and defenses that are relevant in these unique cases. Again, this is not meant to be a list of all possible offenses for which a client could be charged, but it does include a wide range of crimes and suggests the kinds of defenses an attorney should consider under the circumstances. Chapter three gives detailed suggestions about investigating these particular types of cases, and chapter four reviews the critical use of expert witnesses in these cases.

The author, Amy C. Wright, is an attorney living in Austin, Texas, and the editor, Suzanne Donovan, is a writer living in Greenport, New York. This product is the result of the combined efforts of the author, editor, and a number of criminal defense and domestic violence experts who generously reviewed and commented on the text. Special appreciation is extended to Clifton L. "Scrappy" Holmes and his partner, Eric Albritton, for their collaboration and overall support of this project, and to Keith Hampton, Bill Allison, Betty Blackwell, David Fannin, Stanley Schneider, and Pam Sigman for access to their commanding knowledge of criminal defense law. Thanks also goes to Sheldon Weisfeld who kindly arranged for the presentation of this material to a group of criminal defense attorneys, and to the Texas Criminal Defense Lawyers Association, who made possible the dissemination of this manual throughout the state.

This work builds on the research and writing of other individuals and entities working throughout this country on behalf of victims of domestic violence. The project benefitted directly from the specific comments and general expertise of Sarah Buel, Shelby Moore, Bree Buchanan and the Texas Council on Family Violence, D'An Anders, Michele Clark, Leslie Hill, Julie Oliver, Sue Osthoff and the National Clearinghouse for the Defense of Battered Women, and Diane Wiley and the National Jury Project. Finally, this final product would never have been completed without the capable help of research assistants Shannon O'Malley and Jenny Anderson, and the gracious support of Shelia Enid Cheaney, the executive director of the Women's Advocacy Project.



Understanding The Victim's Experience



CHAPTER ONE

UNDERSTANDING THE VICTIM'S EXPERIENCE

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CHAPTER ONE

UNDERSTANDING THE VICTIM'S EXPERIENCE

I. Introduction

"Why didn't she just get out of the abusive relationship, rather than commit this crime?" This is typically the first question posed when a person is charged with a crime, and her participation in the offense is directly related to a history of abuse by an intimate partner. In the prototypical scenario, when a battered woman injures or kills her abuser, the argument that she should have "just left" frequently controls the legal battleground in which she will be judged and possibly punished for fighting back against the abuse. This manual will address other situations as well, for example when the children of battered women are abused and their mother is charged with failing to protect them, or when victims are coerced by their abusers to participate in criminal activities involving drugs, theft, or violence against third parties. This first chapter explores the dynamics of the abusive relationship and attempts to answer the questions "How did she let herself get caught up in this?" and "Why didn't she just leave?" The defense attorney representing a defendant who has been abused must understand, or at least feel comfortable with, the answers to these questions. After all, it is the defense attorney's job to "answer" these questions, whether expressed or not, throughout the battered defendant's experience in the criminal justice system.

In our twenty-first century American ideals, we routinely look to principles of equality for determining how the legal system should treat its subjects, operating from an assumption that men and women are--and should be--treated the same by the legal system. We believe, or want to believe, in gender equality, while at the same time knowing that the experiences for men and women in our culture are quite different. Our expectations of feminine and masculine behavior often reflect and validate those differences, resulting in sometimes rigid stereotypes for the range of acceptable behavior for men and women, while simultaneously holding onto the ideal of equality. The tension between difference and equality plays a dominant role in understanding and applying the legal principles that govern the outcome in cases in which battered women are criminal defendants.

For an audience of lawyers and advocates for criminal defendants, there is nothing new about the notion that our clients are or can be people very much like us, that the line dividing the criminally accused and the rest of the world is a rather thin line, if any at all. But there are special reasons that lawyers, advocates, prosecutors, judges, and juries routinely try to distance themselves from the battered women that we come into contact within the criminal justice system. As Americans, we believe in individual autonomy and control. It is terribly uncomfortable for us to identify with the loss of these vital notions of our personhood, to empathize with "victims." We want to distance ourselves from those persons whose ability to control their own lives was so limited that they hurt or killed their intimate partners, or stood by while their children were abused, or participated in their partner's criminal activities. We have a hard time understanding that doing so appeared to be the best choice available to them among the few bad alternatives that they had, although this does in fact turn out to be the case for many women in our culture.

Battered women are all around us and with us; they are our friends, neighbors, and colleagues. They are "us," and not "them." In order to advocate effectively, for us to educate the jury, judge, and prosecutor about the circumstances of our battered women clients, we must be able to understand, to empathize, to visualize and describe how this person, our client, became one of "them," one of the 4,000,000 women who are brutalized by their intimate partners in the U.S. every year. And to be able to talk about how a fair justice system should treat her when her brutalization led her to be brought before the criminal courts.

This practice manual, especially this first chapter, is directed at those questions: How can we understand, how can we explain, how can we persuade others to care, to empathize, to understand, to either refuse to punish our client or to temper her punishment, because she was caught in an abusive relationship and couldn't (or didn't) get out before the violence led to her involvement in the judicial system—not just as a victim, but as a defendant charged with committing a crime.

II. Domestic Violence in our Culture

The effects of battering in the United States are dramatic and far-reaching, even when the scope of inquiry is limited to specific violent incidents that occur annually and the number of people who are direct victims. Estimates place the number of women abused by their husbands or live-in partners as high as four million per year, with the likelihood of being battered for all women estimated at between 1-in-3 and 1-in-5.¹ More than one million domestic crimes against women are reported to law enforcement each year, with approximately three times as many incidents remaining unreported.² In Texas alone, over 177,000 family violence incidents were reported to authorities in 1999. Of those, 82,209 were husbands victimizing wives.³

The term "domestic violence" may conjure up images of assaults in a wide range of severity, including relatively minor scuffles, but studies have demonstrated that severe abuse is commonplace: Almost one-half of domestic assaults involve such behavior as punching with a fist, kicking, choking, beating, and threatening with or using a gun or knife.⁴ According to a Justice Department report in 1998, of all victims of intimate violence, 1.6% suffered knife or gunshot wounds, 6.3% were threatened with a gun or knife, 7.7% were raped, 8.5% were beaten, and 39.6% were slapped,

¹ Antonio C. Novello, *From the Surgeon General, U.S. Public Health Service, A Medical Response to Domestic Violence*, 267 JAMA 3132, 3185 (1992).

² *Violence Against Women: A Week in the Life of America, A Majority Staff Report, Committee on the Judiciary, United States Senate*, 102nd Cong. 4 (1992).

³ STATE OF TX. DEP'T OF PUB. SAFETY, CRIME IN TEXAS ANNUAL REPORT (1999).

⁴ U.S. DEP'T OF JUSTICE, *Violence By Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* 14 (1998).

grabbed, or kicked.⁵ For women between the ages of 15 and 44, injuries caused by domestic violence exceed those caused by automobile accidents, mugging, and cancer deaths combined.⁶ In Texas, over 7,000 injuries classified as "severe" were sustained in documented family violence incidents in 1999. Such injuries included broken bones, severe lacerations, internal injuries, or unconsciousness.⁷ Forty percent of women seeking treatment in hospital emergency rooms for intentional injuries were harmed by an intimate.⁸

And often it isn't just injuries. Women are killed by their intimate partners at a rate of three per day in the U.S.⁹ Between 1976 and 1996, 31,260 women were murdered by an intimate.¹⁰ The numbers are the highest in the southeast and southwest U.S.¹¹ In Texas, an average of 120 women were killed each year by their male intimate partners for the five-year period 1993-1998.¹² One-third of all women killed in the U.S. are killed by their husbands, ex-husbands, boyfriends, or ex-boyfriends.¹³ According to the Texas Department of Public Safety, the average is even higher in Texas.¹⁴

The same is not true for male victims of violent crime. Males are much less likely to be victimized by a spouse or intimate partner than by another category of criminal perpetrator. Only 2% of overall violent crime sustained by males is caused by an intimate partner, as compared to 21% of overall crime sustained by women.¹⁵ In Texas, women are five times more likely than men to be

⁵ PATRICIA TJADEN AND NANCY THOENNES, U.S. DEP'T OF JUSTICE, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* 7 (1998).

⁶ Antonio C. Novello, *From the Surgeon General, U.S. Public Health Service, A Medical Response to Domestic Violence*, 267 JAMA 3132, (1992).

⁷ STATE OF TX. DEP'T OF PUB. SAFETY, CRIME IN TEXAS ANNUAL REPORT (1999).

⁸ U.S. DEP'T OF JUSTICE, *Violence By Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* 45 (1998).

⁹ *Id.* at 37.

¹⁰ *Id.* at 6.

¹¹ Karen Stout, *Intimate Femicide: A National Demographic Overview*, VIOLENCE UPDATE, February 1991, at 3.

¹² STATE OF TX. DEP'T OF PUB. SAFETY, CRIME IN TEXAS ANNUAL REPORT (1998).

¹³ CRIME IN THE UNITED STATES 1998, UNIFORM CRIME REPORTS, Printed annually by the Federal Bureau of Investigation, U.S. Department of Justice 17 (1999).

¹⁴ STATE OF TX. DEP'T OF PUB. SAFETY, CRIME IN TEXAS ANNUAL REPORT (1998).

¹⁵ U.S. DEP'T OF JUSTICE, *Violence By Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* 4 (1998).

battered by their spouse.¹⁶ Of the murders attributed to intimate partners nationwide in 1996, nearly three out of four had female victims.¹⁷

When women do kill their partners, it is often in self-defense. A 1988 FBI study of partner homicides found that 44% of the women in the study were physically assaulted or threatened with a weapon at or around the time of the murder. Only 10% of the males in that study had been similarly assaulted by their female partners. In addition, over half of the women (58%) had been assaulted by their male partners either at the time of the Homicide or in the past, compared to only 10% of the male defendants.¹⁸

The numbers of women killing their spouses or male partners are typically lower in areas where shelters, legal assistance, and other victim support measures are in place, indicating that when other options are available, women will find an alternative to violence for ending an abusive relationship.¹⁹ Still, only 25% of the women assaulted by their partners escape after the first assault, and just 65% of them ever escape their abusers.²⁰ The rest remain at risk of injury or death, sometimes for their entire lifetimes.²¹

For the women who stay, it is likely that at some point they will take either an active or passive measure for self-protection in response to being battered. Data from a 1998 Justice Department report shows that 75% of women victimized by their intimate partners resist being assaulted, either through passive measures, such as calling the police, or through some form of physical force, like struggling, shouting, or chasing, either with or without a weapon. Thirty-four percent of battered women use self-defensive force against their abusers at least once.²²

These women constitute at least a portion, and possibly the majority, of the females who are becoming criminal defendants at an increasing rate in conjunction with arrests for family violence

¹⁶ STATE OF TX. DEP'T OF PUB. SAFETY, CRIME IN TEXAS ANNUAL REPORT (1999).

¹⁷ U.S. DEP'T OF JUSTICE, *Violence By Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* 1 (1998).

¹⁸ PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEP'T OF JUSTICE, SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES 22 (1995).

¹⁹ Angela Browne, et al., *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 Law & Society Review 75 (1989).

²⁰ Evan Stark, *Rethinking Homicide: Violence, Race, and the Politics of Gender*, 20 INT'L J. OF HEALTH SERVICES 1, 21 (1990).

²¹ *Id.* at 21.

²² U.S. DEP'T OF JUSTICE, *Violence By Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* 19 (1998).

crimes.²³ The phenomenon has yet to be fully explored or understood, but some believe that mandatory arrest policies against abusers have created a backlash against the victims that the policies were designed to protect, either because batterers have become adept at using law enforcement and the criminal justice system against their victims, or because the participants in the system (e.g., police officers, prosecutors, and judges) are reacting against what may be perceived as "too much" victim empowerment. Typically, this sort of legalized countermeasure against victims is explained by reference to notions of equality--"what's good for the goose is good for the gander"--despite the dramatic differences in the context and motivation for men and women when they become involved in violent confrontations.

As the statistics described above reveal, the vast majority of domestic violence incidents involve males abusing females. For this reason, gender designations in this manual will conform to that predominant pattern, with victims referred to as female and abusers as male. This designation is not meant to exclude the use of this manual on behalf of male victims of domestic violence, or to suggest that there are no female perpetrators of abuse. The designation is a shorthand meant to conform to the prevalent paradigm of male-on-female violence in intimate battering relationships. Regardless of their gender, however, victims of domestic violence who become defendants in criminal proceedings are often misunderstood by the criminal justice system. Their role as victims in the battering relationship must play an appropriate part in the outcome of the criminal proceeding, but in order for that to happen, the victim's experience must first be explored and understood by the participants in the proceedings.

III. Common Elements of the Abusive Relationship

"Battering" cannot usually be defined or understood in the context of a single violent incident. It is, instead, a *pattern* of intimidation and control that includes the use of physical violence by one person against another. Individual violent incidents occur in a context that includes some combination of other forms of humiliation, such as name-calling and verbal degradation, threats against loved ones, destruction of personal property, isolation from friends and family, control over finances, and emotional and sexual exploitation, all of which result in the coercive control over the target of these acts. Long-term exposure to this type of victimization can cause some predictable psychological reactions in the victim, although there are variations among victims' responses and adaptations, frequently depending on the specific battering behaviors that are directed at each victim. Some of the more common components of a battering relationship include the following:

A. Physical and Sexual Abuse

Although sometimes infrequent or intermittent, battering relationships all have the common element of physical and/or sexual violence. Women in abusive relationships may be slapped, hit in the face, punched in the abdomen--frequently during pregnancy--tripped, dragged, shoved to the

²³ LAWRENCE A. GREENFELD AND TRACY L. SNELL, U.S. DEP'T OF JUSTICE, *Women Offenders* 6 (1999).

ground, and kicked in the stomach, back, and head. They may be beaten with fists or injured with weapons. Sex may be forced, with the victim being sodomized or raped with a foreign object, such as a hot curling iron or glass bottle, at knife-point or with a loaded gun held to her head. Victims may also be forced to watch while their children are beaten, and their pets are mutilated and killed.

Battered women often lose control over their own bodies, with their abusers forcing breast enhancements, and either requiring or forbidding abortions or pregnancy. Sometimes the physical and sexual abuse is delivered in a controlled, sadistic manner, and sometimes batterers are raging and emotional during their assaults.

Other forms of intimidation and control, described below, interact with the physical violence. Because victims of domestic violence are aware that their abusers are willing to back up threats and threatening behavior with actual infliction of pain and injury, these women will sometimes submit to lesser forms of intimidation once a history or pattern of violence has been established in an attempt to avoid bodily attacks.

B. Physical Intimidation

Intermittent assaults are often reinforced with looks, gestures, and behaviors that are physically intimidating or that convey threats of additional violent assaults. Expressions of rage—red-faced screaming, with fists balled up, hitting walls, kicking objects across the room—can conjure a high level of terror when directed at a person who has previously been injured during such a rage. Controlled expressions of rage or unexpected blasts of explosive fury establish and enforce the batterer's control over the victim, even if she is not physically injured.

Victims regularly report incidents in which their abusers have gone on "rants," which sometimes last for hours, during which the victim is forced to sit and listen while the abuser vents rage over, typically, inconsequential matters such as a dinner not prepared properly, or beds not made as directed, or the victim arriving home late from work. The victim must take responsibility for the infraction, and insufficient remorse may be grounds for the batterer to escalate to physical violence.

Threats of physical violence also create fear for the victim and reinforce the batterer's control. Frequently, batterers will describe in graphic detail the scenarios in which their victims will be sadistically abused or killed. Descriptions of the types of harm that will come to the victims' children and family members further terrify victims. Batterers may also aim loaded guns at their victims, or press knives against their victims' bodies, to illustrate their violent intent. These threats will be played out in the victim's mind repeatedly as she assesses the chances of survival for herself and her family if she leaves or otherwise disobeys her abuser.

C. Financial Control

Gender roles in a battering relationship often track traditional male/female stereotypes, particularly in the financial arena. The male is likely to take the role of the primary wage earner in the family, claiming disproportionate control over finances, frequently setting very restrictive

"allowances" for household or personal spending by the female in the relationship. The decision about whether and to what extent the woman will work outside the home is typically made by the abusive male partner. Women in battering relationships, even if they work outside the home, will often come to defer to the husband's dictates about finances over time, turning over their entire paychecks to their abuser, and having little if any knowledge of the family's finances. The lack of access to money is a major contributor to many victims' inability to leave their abusers.

Control over money is an explosive issue for many batterers, with notions of "waste" or "mismanagement" of money becoming a trigger for violent rage when their victims try to exercise any financial decision-making—for example, asking for money for a specific expense—but especially if the victim takes or uses money without first obtaining the batterer's permission. Over time, a victim may develop profound timidity surrounding monetary matters, causing her to become unable to visualize or plan for her own financial independence. For those who ultimately leave or divorce their batterers, it is commonplace for them to walk away from any claim to a share of the community estate, because they have been indoctrinated to believe that they have no right to any of the family's resources.

D. Isolation

Following traditional ideals, female victims regularly play the role of home caretaker, with their involvement in activities outside the home likely to be restricted by various means by the abuser. The notion is effectively conveyed by the abuser that her primary responsibility is to take care of the home and family, and that commitments to others are interfering and must be eliminated. Frequently, access to transportation is limited, and it is typical for batterers to monitor mileage on the car, to place restrictions on any time spent away from home, and to interrupt and/or cut off the victim's communications with family, neighbors, friends, and co-workers. A batterer may physically control victim's comings and goings by barricading her in the home, taking the keys to her car, or removing or disconnecting the telephone.

Jealousy, often extreme jealousy, by the abuser invades any other relationships that battered women develop, particularly relationships with males, but also with female friends and relatives. Accusations of infidelity and/or lesbianism reinforce the batterers' attempts to disrupt the victim's friendships. Generally, relations with the victim's family become strained, either because the batterer alienates the family or because the family becomes aware of the abuse and reacts in opposition to the batterer's control. The batterer will frequently set up situations in which the victim is forced to choose between her social contacts and her husband, with repercussions for making the "wrong" choice determined by the batterer.

Over time, victims will come to expect difficulty with their husbands or intimate partners whenever an outsider to the relationship becomes involved in her life, and will maintain an isolated life to avoid confrontation from the abuser. In addition, most victims feel ashamed that their partners are abusing them, and because intimacy with friends and family may expose the abuse, they may shy away from becoming close with anyone for that reason as well. The absence of outside contacts reinforces the batterer's control over the victim, and diminishes her access to resources and support that would help her to better assess her situation and respond appropriately.

E. Patterns of Violence and Abuse

Patterns emerge over the history of an abusive relationship. Each batterer uses a specific set of control mechanisms, which may include some or all of the methods identified above, and the timing and interplay of these and other tactics will vary from one abusive relationship to another. Some characteristics and patterns have been identified as prevalent in battering relationships, but the presence or absence of any one of these elements does not determine whether a particular relationship is "abusive," or whether a particular partner fits the definition of a "batterer" or "victim."²⁴

One cyclical pattern has been found to occur in approximately two-thirds of abusive relationships, and is commonly referred to as the "cycle of violence."²⁵ This pattern is likely to be present in the early stages of a battering relationship and is characterized by three stages beginning with the tension-building phase, which continues until an acute battering incident occurs, followed by a period of contrition. During the third phase, the batterer is likely to express remorse in an overpoweringly effusive manner, with emotional and tearful apologies, promises to change, extravagant and thoughtful gifts, and expressions of child-like need for the victim's forgiveness. This is a powerful inducement for the victim to remain in the relationship; it reinforces her belief that the batterer will change, and ignites new hope for survival of the relationship.

Statistics reveal that, over the course of a relationship, the intensity or occurrence of the contrition phase is likely to diminish for those in which this cyclical pattern of abuse is present.²⁶ And some battered women never experience the emotional pull of this cycle at all. Some batterers are never apologetic, and some violence is never foreshadowed by a period of escalation, but rather occurs in lightning-strike fashion, or just simply never lets up. When it occurs, however, the absence of violence for any period of time is reinforcing for the victim.²⁷

If asked while in the throes of an abusive relationship, "What do you want to change?" many victims answer simply that they want the violence to stop. It is likely that the violence was not part of the initial stages of the relationship, so the victim has experienced the person that she fell in love with as non-violent. And now, that person is someone that she has been attached to for some time, and may have married or share children with; he is also the person who is hurting her or her children. The hope that the abusive component of her loved one can be "fixed," or that the abuser will understand and change this part of his personality, is connected to the victim's longing to keep the family intact and to hold onto what may be, in some good moments, a loving relationship.

²⁴ See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome* 21 HOFSTRA LAW REVIEW 1191, 1208 (1993).

²⁵ See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 95-97 (1984).

²⁶ See *id.* at 96.

²⁷ *Id.*; see also Mary Ann Dutton, *supra* note 24, at 1208-9.

IV. Myths about Battering

Misconceptions about domestic violence abound, but some stereotypes show up often enough to have become commonplace. People who are uninformed about domestic violence are likely to have heard, and may believe, some of these "myths." Juries especially, but also judges, prosecutors, and other attorneys, may be moved by arguments that are based on these misunderstandings, and it will be especially important to confront and dispel these myths:

Myth: Battered women provoke violence and enjoy being abused.

Battered women generally go to great lengths to understand and prevent the recurrence of violence against them by their partners. They are routinely told by their abusers that their behavior justifies their being beaten, and they sometimes come to believe this themselves, but their response is typically to go to greater lengths to satisfy the demands or expectations of their abuser. Battered women do not enjoy being hurt.

Myth: Battering only occurs in poverty-stricken homes or among minority families, not among middle-class white families.

Domestic violence cuts across all race, class, and economic lines. Battered women may be educated or uneducated; poor, middle-class, or wealthy; white, Latina, American Indian, Asian, or African-American. The 1994 Justice Department National Crime Victimization Survey found a difference of only 10% between the rate of family violence in households with incomes less than \$10,000 and those earning more than \$50,000.²⁸ Battered women include career-oriented professionals and stay-at-home wives of wealthy businessmen.²⁹ It is foolhardy to assume that just because a woman has money or degrees that she is not battered.

Battering does occur in minority homes, however, and also in homes in the lower socioeconomic strata. Battered women of color must deal with the problems of racial stereotyping and ethnic prejudice, which create special barriers to obtaining fair treatment in the criminal justice system. For instance, African-American women, who are more likely to be viewed as strong, domineering, and angry, may find judges and jurors unsympathetic to claims that they were victimized and acted in self-defense.³⁰ Community loyalty may cause some battered women of color to refrain from reporting or otherwise making public their own victimization, because doing so might corroborate the stereotype of minority communities as pathologically violent.³¹ Poor women

²⁸ U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY 35-36 (1994).

²⁹ For additional data and anecdotal information regarding upper-income battered women, see Hillary Johnson, *The Truth about White-Collar Domestic Violence*, WORKING WOMAN (March 1995).

³⁰ See Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 302-03 (1995).

³¹ See Kimberle W. Crenshaw, *Cultural Battery*, 25 U. TOL. L. REV. 891, 896 (1993).

without job skills will find it especially difficult to gain economic independence, and may remain with their batterers simply for the basic necessities for survival. Even though the economic and cultural forces at work in their lives differ, battered women exist throughout the strata of the American population.

Myth: *Battering is caused by drug or alcohol use.*

More than one-third of violent partners do not drink. Some abusers use substance abuse as an excuse for the violence. Frequently, after treatment for substance abuse, the violence continues.³² Alcohol and drug abuse are a common *symptom* of an abusive personality, not the cause of it.

IV. Why Didn't She Leave?

The question "Why didn't she leave?" seems inevitable; it comes to mind almost immediately for those in contact for the first time with the plight of a victim of domestic violence. Pieces of the tangled complex of answers to this question are set forth in some detail below. First, however, the framework of this inquiry must be examined.

A. Victim-Blaming: Focusing on the Victim's Response Rather than the Abuser's Violence.

It is interesting that the first questions asked when a man batters a woman aren't: "What was wrong with that man?" "How in the world could he think he could do that to her?" "Why wasn't he in jail for hurting her?". The tendency instead is to question the victim's response, deflecting examination of why the abuser treated her as he did, why he was able to "get away with it," why society didn't intervene sooner, and why our courts and other institutions continue to disclaim responsibility for taking action to end violence against women.

The notion that it is the victim's responsibility to stop the violence by leaving the abusive relationship is based on at least two questionable assumptions: First, that her leaving will in fact decrease or eliminate the violence directed at her; and second, that our social and legal institutions will assist her if she does leave or take any other action to put an end to the violence. As many widely-publicized incidents reveal, battered women may be at the greatest risk of harm when they attempt to leave their violent relationships. Non-fatal violence often escalates once the battered woman attempts to end the relationship,³³ and women are most likely to be murdered when

³² See Howard Holtz & Kathleen Furniss, *The Health Care Providers Role in Domestic Violence*, 8 TRENDS IN HEALTH CARE, LAW & ETHICS 48 (1992).

³³ David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 13 RESPONSE 13-16 (1990).

attempting to report abuse or to leave an abusive relationship.³⁴ Women who are trying to decrease the risk of harm to themselves and to their children and other family members are usually behaving rationally when they postpone leaving or agree to reconcile.

An abuser rarely lets his victim "just leave." The woman is stalked, harassed at work, phoned at all hours of the night and day, threatened, bullied, and manipulated. Her partner sobs and begs for another chance, is apologetic and remorseful. When he is unsuccessful at getting his partner to return, he becomes raging, vengeful, and terrifying. The children are used as pawns to convey the abuser's messages after visitation. The children also serve as a means to require the victim to remain in contact with the abuser, often as subjects of expensive and destructive custody litigation. How many news stories have appeared in your community of men killing their children, wives, or themselves in the immediate aftermath of a separation or divorce? The reality at most courthouses is that it isn't the criminal courts that are dangerous, it's the family courts.

B. Why Should *She* Have to Leave?

Any adherent to notions of justice or equality must question the inequity implicit in the assumption that a victim must give up her home, her community, and any stability she has created for herself and her children because of the criminal behavior of her intimate partner. How simple is it to uproot one's self and children, in the middle of the maelstrom of a violent relationship? How much are the physical difficulties of moving—packing and transporting a household; locating, unpacking, and setting up in a new household—made even more difficult if the move is in a crisis, or in secret, or if there isn't enough time to identify and pack essential household and personal items at the time of departure? How much is the toll of rebuilding a life after a move—finding a new home, a new job, new schools for the children? How much time and energy are needed for creating a sense of stability in a new home, absorbing the expenses of moving, setting up new childcare arrangements, overcoming disorientation in a new neighborhood or city, establishing new relationships with a church, neighbors, and coworkers? On the economic front alone, moving is an impossibility for many battered mothers. After factoring in all of the other dislocations and difficulties of moving away from one's home, particularly for those in the midst of crisis or under the debilitating stress of long-term abuse, how can anyone flippantly suggest that the victim's leaving is the obvious and "easy" solution to ending the violence?

But, many say, if she is *really* in fear for her life, wouldn't she find some way to overcome these obstacles and get away? Let's say she does, and in fact, in a number of cases, battered women attempt to do exactly that, sometimes successfully. Does that accomplish the result we're hoping for? Does the victimization end? Not for the vast majority of victims who are able to get away. Up to 75% of domestic assaults reported to law enforcement agencies were inflicted after separation of the couples.³⁵

³⁴ D. Sonkin, D. Martin, and L. Walker, *THE MALE BATTERER: A TREATMENT APPROACH* (1985); Angela Browne, *WHEN BATTERED WOMEN KILL* (1987).

³⁵ U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *REPORT TO THE NATION ON CRIME AND JUSTICE* (1983).

C. Reasons She Didn't Leave

Some of the obstacles that victims of domestic violence say kept them from leaving or caused them to return to their batterers after leaving include the following:

1. **Money.** The biggest obstacle to leaving is a victim's lack of access to enough money to set up a household on her own and support herself and her children. Victims are regularly without access to family funds, and frequently do not have jobs or job skills that will sustain a single-parent family. Welfare benefits are woefully inadequate for a family's survival: When a battered woman leaves her abuser, there is a 50% chance that her standard of living will drop below the poverty line.³⁶ Victims given a choice between endangering themselves and watching their children go hungry will frequently choose to subject themselves to endangerment, making a rational choice to return to an abusive relationship so that their children will have a place to live and enough to eat.

2. **Threats Against Her and the Children.** The victim believes the batterer's threats to kill her and the children if she attempts to leave. Leaving can be the most dangerous time for a battered spouse—she is more likely to be murdered when she tries to flee or has fled, than when she stays. The single greatest motive for the killing of an intimate partner is the offender's refusal to accept the termination of the relationship.³⁷

3. **Threats to Take the Children.** It is commonplace for abusers to threaten to take the children away if the victim considers leaving, either by fighting for custody or by "disappearing" with the children, and victims are afraid of losing their children. This fear is rational, more than 75% of the parental abductions that occur in the U.S. are perpetrated by men.³⁸ And more than half occur in the context of domestic violence.³⁹ Forty-one percent of child abductions occur between the time of separation and divorce, and another 20% occur during the two-year period immediately after the parents' relationship is dissolved.⁴⁰ The mother is, of course, not the only victim of this crime; the children suffer severe emotional and physical repercussions as a result of parental abduction.

4. **He Doesn't Leave Her Alone When She Leaves.** It is rare for an abuser to leave his battered partner alone if she leaves him, so "leaving" does not free the victim from abuse, it just changes the nature of the abuse. A batterer intent on controlling his victim becomes increasingly

³⁶ *Women and Violence*, HEARINGS BEFORE THE U.S. SENATE JUDICIARY COMMITTEE (August 29 and December 11, 1990, Senate Hearing 101-939, pt. 2, at 95).

³⁷ Christine E. Rasche, *'Given' Reasons for Violence in Intimate Relationships*, HOMICIDE: THE VICTIM/OFFENDER CONNECTION (1993) (Anna Wilson, ed.)

³⁸ DAVID FINKELHOR, ET AL., U.S. DEP'T OF JUSTICE, MISSING ABDUCTED, RUNAWAY, AND THROWN AWAY CHILDREN IN AMERICA 54 (1990).

³⁹ See GEOFFREY L. GREIF & REBECCA L. HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES 36 (1993);

⁴⁰ See FINKELHOR, *supra* note 32, at 55.

desperate if he is unable to control what is happening, or get his partner to return. He will go to extreme measures to find her if she is in hiding. He will spend whatever time or other resources are necessary to locate her, to find ways to contact her, to persuade her (either through threats or contrition) to come home. He stalks her. He stalks her friends, embarrassing her. He files a suit for custody of the children. She has to go to court, where he waits in the hallways to see her and talk to her, and she is required to incur heavy legal expenses to keep him at bay. He maintains contact in any manner he can figure out, and his obsession with her is terrifying. After going through this once or twice, and reconciling, the victim has a clear picture of what life is like when she "leaves."

5. **Concerns for the Children.** Some victims want their children to grow up in a family where both parents live in the same home. If the batterer isn't physically abusing the children, the victim will often believe that the children are better off if she stays, not realizing the extent of harm to the children when they witness abuse of one parent by the other. Children are usually attached to both of their parents. Even though they want the violence to end, they often pressure the victim to reconcile with the abuser, in part because they want the family to stay together and also because the batterer will encourage the children to participate in his relentless pursuit of reconciliation. The children are often used to send the batterer's messages to the victim when they are returned to her after visitation with the batterer.

6. **Belief that the Abuser has "Changed."** The batterer's claim to have changed plays directly into the victim's desire to keep her family together, and she is likely to believe him when he says that he is sorry and promises that he will never hurt her again. He will do anything and everything to convince her of this whenever she reaches the point of leaving, and her own desire to encourage him and help him to change contributes to her feeling that there is hope for the relationship.

7. **Pressure from Family and Friends.** Even if the victim is able to fend off the batterer's pleas for reconciliation, her family and friends may be sympathetic to his expressions of remorse. Many well-meaning people may encourage her to "give him another chance" or tell her that "everyone makes mistakes" and a good partner must be able to forget and forgive on occasion. Uninformed religious advisors who are committed to marriage as an institution may counsel victims to overlook or "get past" an abusive incident and work on the marriage with their contrite spouse.

8. **Belief that the Abuse is Her Fault.** Most victims believe, on some level, that they caused the violence perpetrated against them, or at least participated on some level in allowing it to happen. The batterer has usually told the victim that she forced him to resort to violence by her willfulness or refusal to honor him and obey his directives. She is likely to believe that if she could just be a better wife, homemaker, or parent, then the batterer would not be violent. Her increasing commitment to be more compliant to her batterer's controlling behavior, over time, decreases her ability to make a move for independence.

9. **Isolation, Depression, and Low Self-Esteem.** Long-term victimization can sap the strength of the strongest and most independent among us. Over time, victims respond to the batterer's injuries and humiliations by withdrawing, losing confidence, and becoming depressed. The batterer's efforts to cut the victim's ties to her family, friends, and colleagues works together

with the victim's dwindling self-esteem to disable her from accurately assessing her situation and developing a plan to escape. Battered women who have become dependent on alcohol or drugs to blunt their pain may feel especially vulnerable to attack if they leave their batterer.

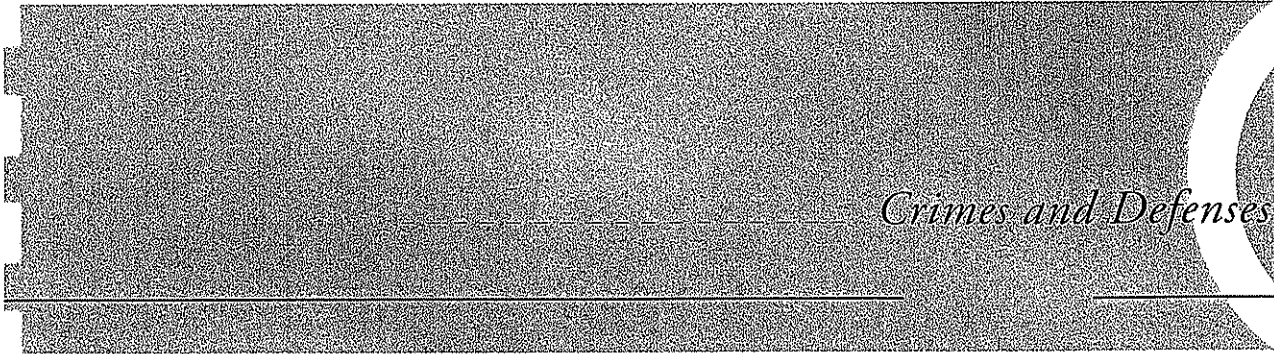
10. **Gratitude and Love.** All intimate relationships have complexities and contradictions—battering relationships simply take these elements to the extreme. It is common for battered women to feel a strong sense of connection and love for their batterers. After falling in love, marrying, and having children with their abusers, victims are bound to their abusers by a myriad of emotional pulls. Women who have children from a prior relationship may feel grateful to their batterers for helping to raise their children. A strong sense of shared history, memories of early courtship and of tender moments, the connection created by having children together, the sense of familiarity—all of these emotional ties complicate the victim's decision to end her relationship with a partner who has become abusive.

11. **Lack of Responsiveness of Law Enforcement and Legal Institutions.** When a victim is told by the authorities that her situation is her own fault, or that nothing can be done to prevent her abuser from doing what he wants, or that she may lose custody of her children to Child Protective Services or to her batterer, or that she can't get or doesn't deserve legal protection, all of her fears are realized. Most victims have sought help and been disappointed. They have learned not to trust the legal system or its actors, including the police, her own attorney, and the judges that preside over their cases. After one bad experience with law enforcement or the legal system, many victims are unlikely to try again.

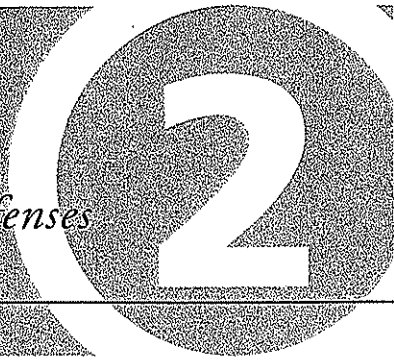
VII. Conclusion

Some level of submissiveness by women is and has been expected in our culture for centuries. Throughout the history of Western civilization, the notion that women are the property of men, and that husbands have the right to beat their wives, has been legally acknowledged and enforced. Institutions of law, employment, and religion have reinforced the feminine stereotype of passivity and obedience, and economic, social, and legal inferiority for women has been the unquestioned norm until only recently. When laws were finally passed in the late nineteenth and early twentieth centuries restricting a husband's right to beat or rape his wife, it remained difficult to impossible for victims to get law enforcement or the criminal courts to act to enforce those laws for decades. Some religious institutions, even to this day, assert male authority over their wives, in some instances blatantly. Economically, women still lag behind men in the workplace, and they bear a disproportionate share of responsibility for child-rearing and domestic duties.

While strides have been made toward ameliorating the vestiges of inequality and sanctioned use of violence by men against women, the old stereotypes and biases remain a part of our culture, in many instances subconsciously. Acts of violence perpetrated by women are viewed differently than those by men, and justifications for male aggression are more likely to be understood and accepted. When women's experiences have gained the same level of empathy and respect, our judgments of their behaviors as criminal defendants will comprehend the complexities and subtleties of their lives.



Crimes and Defenses



CHAPTER TWO

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CHAPTER TWO

CRIMES AND DEFENSES

I. Introduction

Generally, what has become known as the “battered woman’s defense” has been used to defend victims of family violence when they have fought back against their abusers and were then charged with a violent offense, such as murder or assault. However, the “battered woman’s defense” is not a defense in itself but rather the factual basis for a statutory defense under Texas law, such as self-defense or duress, or the explanation of adequate cause for sudden passion under the definition of voluntary manslaughter.¹ Reference to a “battered woman’s defense” in the legal context is not only a misnomer—there is no such recognized “defense”—this usage should be avoided also because it may draw a negative connotation for your defensive theory due to the larger societal rejection of “abuse excuses.”

Evidence of the defendant’s history of abuse is nevertheless critical to her defense. Such evidence ordinarily goes to prove that her fear of imminent harm by her abuser was reasonable to support a self-defense theory, or to explain the level of terror that had cumulated over a series of physical beatings in presentation of sudden passion issues. Other defenses commonly associated with battered women’s circumstances include duress, and other crimes that are frequently prosecuted include those involving harm to battered women’s children.

Legal issues other than those presented here may come into play for battered women charged with crimes under Texas law. This chapter is limited to the most obvious legal situations in which a history of abuse may be relevant. Because domestic violence is a pervasive component of our culture, it is likely that there are other, more obscure legal arenas in which a history of abuse may be relevant in the criminal system. The following, while not exhaustive, is a summary of relevant statutory crimes and defenses that typically require presentation of a history of abuse if the defendant is a victim of battering.

¹ The California Court of Appeals attempted to disabuse the legal community of this common misunderstanding in its 1992 decision in *People v. Romero*:

There nevertheless still exists a misconception by some lawyers and judges that there is a defense called “battered woman syndrome” giving women who are battered some unique right simply because they are battered. That is not the law in California (or, as far as we can tell, anywhere else).

26 Cal.App.4th 315 at 337 (Cal. App. 2d Dist. 1992).

II. Homicide and Defenses

Murder is defined as a homicide that is committed intentionally or knowingly.² The offense is a first degree felony, unless committed under the "immediate influence of sudden passion arising from an adequate cause," formerly known as voluntary manslaughter, but recently recodified as a punishment issue reducing the charge from a first degree to a second degree felony.³ In the case of murder involving remuneration, either by way of a murder for hire, or when the defendant benefits financially from the death, the offense is capital murder.⁴

These sections of the Texas Penal Code are the basis for prosecutions against battered women who kill their abusers. The defenses that are typically involved in this scenario are self-defense, defense of third persons, and in rare cases, insanity. Whether and which defense might be successful, as well as what offense may be charged by the prosecutor, will likely turn on whether the killing occurred during a confrontation or during a lull in the violence, for instance, while the abuser is sleeping or in a contract murder.

Defendants in the nonconfrontational cases may be suffering under a very real belief that they are in a kill-or-be-killed situation, but historically these defendants have not been as likely to prevail on a self-defense claim, if they are even allowed by the court to present such a defense at trial. If the defendant has employed another to carry out the death of her intimate partner, or if she sustains any financial gain as a result of the death, the possibility of the death penalty, or life imprisonment, is very real.

Special evidentiary provisions govern battered women's self-defense cases in murder prosecutions. Article 38.36(b) of the Texas Code of Criminal Procedure, passed by the legislature in 1994, codified the Texas Court of Criminal Appeals' seminal decision in *Fielder v. State*,⁵ which specifically required trial courts to admit expert testimony regarding the effects of battering on the defendant's state of mind when self-defense is asserted by a victim of family violence charged with killing her abuser. The statutory provision is limited to murder cases in which self-defense or defense of others is at issue, but such evidence is clearly relevant and admissible with regard to other crimes and defenses.⁶

² TEX. PENAL CODE §§ 19.01, 19.02.

³ TEX. PENAL CODE § 19.02(d).

⁴ TEX. PENAL CODE § 19.03(a)(3).

⁵ 756 S.W.2d 309 (Tex. Crim. App. 1988); see *Osby v. State*, 939 S.W.2d 787, 790 (Tex. App.—Fort Worth 1997, no pet.) (acknowledging that TEX. CODE CRIM. PROC. art. 38.36(b) is a codification of the *Fielder* case); *Smith v. State*, 5 S.W.3d 673 (Tex. Crim. App. 1999) (same).

⁶ See *infra* note 30 (citing cases in which a history of abuse and accompanying expert testimony was admitted in support of insanity plea); *infra* notes 38-42 and accompanying text (discussing cases in which a history of abuse and expert testimony were admitted in cases involving defense of others). Cf. *Osby v. State*, 939 S.W.2d

A. Self-Defense

Self-defense is a complete defense to homicide, serving as justification for the act of killing and exempting that act from criminal liability. Self-defense originated as a defense applicable to a confrontation between two relative strangers of equal strength, *i.e.*, the barroom brawl scenario, and commentators have struggled with the difficulties associated with applying the defense to a battered woman accused of killing her abuser.⁷ The defense is, nevertheless, unambiguously applicable to the situation where a battered woman kills during a confrontation with her abuser, when the abuser is assaulting or threatening her.

Two statutory provisions govern the assertion of self-defense against a murder charge: Sections 9.31 and 9.32 of the Texas Penal Code. The general requirements are set forth in Section 9.31, and the additional elements that must be satisfied when deadly force is used are set out in Section 9.32. To justify the use of deadly force, there are special retreat and proportionality requirements that must be met in addition to the usual strictures of self-defense law.

The elements of self-defense under Texas law make the application of self-defense more difficult in non-confrontational situations, but the defense may still be available in some of these types of cases. The defendant must carry the burden of production, by presenting some evidence to support the elements of the defense, whereupon the prosecution has the burden of persuasion to negate the defense beyond a reasonable doubt.⁸

1. Degree of Force. Self-defense justifies the use of only that degree of force necessary for self-protection, *i.e.*, the force used in self-defense must be "proportional" to the threatened force.⁹ When the force used is deadly force, the defendant must prove either that she was acting to prevent the imminent commission of one of the offenses listed in the statute (aggravated kidnapping, murder, or sexual assault), or that she was protecting herself against the use or threatened use of deadly force.¹⁰

If the abuser was not armed with a deadly weapon at the time of the assault, proportionality can be established in part by emphasis on the disparity between the abuser's size and

787, 789-91 (Tex. App.—Fort Worth 1997, no pet.) (finding that expert testimony regarding the defendant's state of mind is not admissible under TEX. CODE CRIM. PROC. § 38.36(b) unless the defendant is a victim of family violence); *Avila v. State*, 954 S.W.2d 830 (Tex.App.—El Paso 1997, *pet. ref'd*) (expert testimony regarding state of mind generally inadmissible unless the defendant is a victim of family violence).

⁷ See, e.g., Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

⁸ TEX. PENAL CODE § 2.03(c), (d).

⁹ TEX. PENAL CODE § 9.31(a).

¹⁰ TEX. PENAL CODE § 9.32(a)(3).

strength and that of the defendant.¹¹ It is likely that a defendant of lesser size and strength will be quickly disabled and incapable of mounting any defense if she does not respond with sufficient force once she determines that her life is threatened. It can be argued that when a person of inferior strength is assaulted or threatened with assault, the only way to fend off the attack proportionally is by resort to a weapon to offset the disparity in strength.

The statute states that verbal provocation alone will not justify the use of deadly force in self-defense,¹² but verbal threats in combination with other acts that produced fear in the defendant's mind are sufficient to entitle the defendant to a jury instruction on self-defense.¹³

2. **Degree of Immediacy of the Threatened Conduct.** To justify the use of deadly force in self-defense, the defendant must demonstrate that such force was *immediately* necessary to protect herself against the abuser's use of deadly force.¹⁴ For cases in which the battered woman is actively fending off an attack at the time of the killing, this element typically would be established by the client's own testimony describing the on-going acts of aggression against her at the time that she reacted with the use of deadly force, bolstered by other evidence regarding the abuser's history of violence against her, specifically admissible under article 38.36 the Texas Code of Criminal Procedure.

a. **"Immediate" v. "Imminent."** For the less confrontational, or nonconfrontational, situations, an argument is available that the Texas statute's use of the term "imminent," in addition to the term "immediate," broadens the scope of the defense. Subpart B of the "deadly force" self-defense provision of the Penal Code provides that deadly force may be used when it is immediately necessary to prevent an *imminent* attack, such as aggravated kidnapping, murder, or sexual assault.¹⁵ The use of the term "imminent" has been contrasted with "immediate" in cases involving battered women in other states, with one court explicitly adopting the view that "the time limitations in the use of the word 'immediate' are much stricter than those in the use of the word 'imminent.' . . . [T]he use of the word 'immediate' . . . places undue emphasis on the immediate action of the deceased, and obliterates the nature of the buildup of terror and fear which

¹¹ See, e.g., *Halbert v. State*, 881 S.W.2d 121, 124 (Tex.App.—Houston [1st Dist.] 1994, pet. ref'd) (contrasting the defendant's deceased boyfriend as "well-developed and well-nourished" at 186 pounds with the defendant, who was "only 126 pounds at the time of the killing").

¹² TEX. PENAL CODE § 9.31(b)(1).

¹³ Compare *Halbert*, 881 S.W.2d at 124 (statute satisfied when the deceased "came towards" the defendant as he threatened to kill her) with *Lane v. State*, 957 S.W.2d 584 (Tex.App.—Dallas 1997, pet. ref'd) (statute not satisfied when threat to kill was made over the telephone, without any overt act).

¹⁴ TEX. PENAL CODE § 9.32(a)(3)(A).

¹⁵ TEX. PENAL CODE § 9.32(a)(3)(B).

had been systematically created over a long period of time. 'Imminent' describes the situation more accurately."¹⁶

b. **"Apparent danger" analysis.** In *Lane v. State*,¹⁷ a Dallas Court of Appeals decision, Justice James argued for a broadened interpretation of the immediacy requirement under an "apparent danger" analysis.¹⁸ Justice James argued that the battered woman criminal defendant in that case should have been permitted to claim self-defense for shooting her sleeping husband five hours after he graphically described the method by which he would torture and kill her and her daughter.¹⁹ Relying on Texas Court of Criminal Appeals cases addressing the "apparent danger" doctrine, the dissenting justice took the view that the immediate danger to the defendant was apparent to her, whether actual or not.²⁰ The facts, as described in both the majority opinion and Justice James' dissent, certainly support that interpretation of the defendant's mental state at the time of the shooting.²¹

c. **Right of pursuit.** Also of assistance in the presentation of a nonconfrontational self-defense case, when the issue of immediacy is difficult to establish, is the Texas doctrine recognizing a limited right to pursue an attacker under the law of self-defense. The right of pursuit acknowledged in Texas case law allows a defendant who has pursued her attacker to claim self-defense if the attacker has retreated to a vantage point from which he may renew the attack or threatened attack.²² Thus, if the batterer's assaults and threats to kill are followed by a lull in the violence, and the defendant uses deadly force to defend herself during that lull, she may avail

¹⁶ *State v. Hundley*, 693 P.2d 475, 478-79 (Kan. 1985). See also *State v. Wanrow*, 559 P.2d 548, 556 (Wash. 1977); *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983); Book Review, 4 VIOLENCE AGAINST WOMEN 625, 627 (reviewing Donald A. Downs, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW (1996), in which the author argues that "imminent" should be read as "a serious potential for impending bodily harm or death" and not "immediate"); BLACK'S LAW DICTIONARY 676 (5th ed., 1979) (defining "imminent danger": "In relation to homicide in self-defense, this term means immediate danger, such as much be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law."). The Texas Court of Criminal Appeals defined "imminent" in *Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989), by reference to Black's Law Dictionary, as "near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous." See also *McGarity v. State*, 5 S.W.3d 223, 227 (Tex.App.-San Antonio 1999, no pet.) (analyzing "imminence" under the definition set forth in *Smith v. State*).

¹⁷ 957 S.W.2d 584, 587-92 (Tex. App.-Dallas 1997, pet. ref'd) (dissent).

¹⁸ *Id.* at 590.

¹⁹ See *id.* at 585-86, 588.

²⁰ See *id.* at 590 (citing *Jones v. State*, 544 S.W.2d 139, 142 (Tex. Crim. App. 1976)).

²¹ See *id.* at 588-89.

²² *Taylor v. State*, 947 S.W.2d 698, 705 (Tex.App.-Fort Worth 1997, pet. ref'd) (citing *Hunter v. State*, 128 S.W.2d 1176, 1180 (Tex. Crim. App. 1939); and *Thompson v. State*, 276 S.W. 699, 702 (Tex. Crim. App. 1925).

herself of the right to pursue doctrine if she can establish that the threat to her life remained palpable during the lull. A jury charge on this issue is required if the evidence supports it.²³

3. **Duty to Retreat.** If deadly force is used, self-defense is justified only "if a reasonable person in the actor's situation would not have retreated."²⁴ The retreat requirement arises only after the abuser has begun to use or is attempting to use unlawful force against the defendant; this is not a general duty to leave an abusive relationship.²⁵

Some evidence that a reasonable person in the defendant's circumstances would not have retreated must be offered in order to satisfy the defendant's burden of production on self-defense. In *Halbert v. State*,²⁶ the burden was satisfied by the defendant's testimony that she backed into the kitchen when her boyfriend attacked her, but the back door was locked and the windows were blocked by burglar bars. The only way out was through the front door, and she testified that she didn't believe that she could have made it past him.²⁷ The *Halbert* case is contrasted with *Hutcheson v. State*,²⁸ where the court found that no evidence was offered on the retreat requirement when the defendant testified in response to questioning about her retreat options that she did not know why she remained in her estranged husband's apartment while he was out of the room; instead, she had moved his shotgun out of reach and resealed herself on the sofa, awaiting his return.²⁹

Under the statute, no person is required to retreat from a confrontation by another who is at the time committing an offense of unlawful entry in the defendant's habitation.³⁰ As a result, the duty does not attach if the abusive partner is unlawfully in the home of the defendant. Whether it is reasonable to require a defendant to retreat from her own home if under attack by an abusive

²³ *Id.*; see *McElroy v. State*, 445 S.W.2d 223, 225 (Tex.Crim App. 1970) (recognizing that a jury instruction on right to pursue is required if raised by the evidence). See also MCCLUNG & CARPENTER, TEXAS CRIMINAL JURY CHARGES § 12:1110.90 (1999) (Right to Pursue).

²⁴ TEX. PENAL CODE § 9.32(a)(2). However, there is no duty to retreat after September 1, 1995, before using deadly force against a person unlawfully entering the defendant's habitation. See TEX. PENAL CODE § 9.32(b).

²⁵ See *Halbert v. State*, 881 S.W.2d 121, 125 (Tex.App.—Houston [1st Dist.] 1994, pet. ref'd) (self-defense not negated by availability of retreat prior to abusive husband's confrontation, since duty to retreat arose only after defendant perceived danger of use of unlawful force against her).

²⁶ *Id.*

²⁷ *Id.* at 125.

²⁸ 899 S.W.2d 39 (Tex.App.—Amarillo 1995, pet. ref'd).

²⁹ *Id.* at 42.

³⁰ TEX. PENAL CODE § 9.32(b).

partner who lives in that home is left open by the Texas statute.³¹ It is within the jury's discretion to determine what is reasonable under the circumstances. The Practice Commentary to the statute states that "[i]t is contemplated that the factfinder will make a moral judgment on whether a defendant in a specific case ought to have retreated before threatening or using deadly force."³²

It is, again, more difficult to satisfy the "duty to retreat" element in nonconfrontational killings. In those cases, evidence of the severity of the battering and the terror it instilled in the defendant, combined with expert testimony on the effects of a history of battering, both of which are admissible under article 38.36(b) of the Texas Code of Criminal Procedure, will help to explain that based on the defendant's history with the abuser, she was reasonable in her belief that retreat was not only unavailable but also ineffective as a method for escaping from the abuser. At least one judge has been persuaded that this is a valid argument under Texas law.³³

4. **"Reasonableness."** The defendant must not only *subjectively* believe that deadly force is immediately necessary to defend herself, but her subjective belief must also be *reasonable*.³⁴ The reasonableness of the defendant's belief is judged from the perspective of an ordinary and prudent woman in the same circumstances as the defendant at the time of the incident.³⁵ This combination of objective and subjective perspectives should factor in, to the defendant's favor, circumstances such as the disparity in size between the defendant and the abuser and the abuser's historical use of violence and threats of violence against her in determining whether she was reasonable in her belief that she was in danger of a deadly assault or attack.

If it is demonstrated that the abuser was not a deadly threat on the occasion in question, the defense is not necessarily negated. It is possible for the defendant to be incorrect in her assessment of the danger. The defense requires only that she believed that the apparent danger was real, and that her belief, viewed from her standpoint at the time, was a reasonable one. If so, she

³¹ Other states have opted not to require an "unlawful" presence in the home as a condition of this exception to the duty to retreat; therefore, a defendant would have no duty retreat from an attack by a cohabiting partner prior to using self-defense. See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 108(2)(C)(3)(a); 18 PA. CONS. STAT. ANN. § 505(b)(20)(ii)(A); N.Y. PENAL LAW § 35.15(2)(a)(i); ARK. STAT. ANN. § 41-507(2)(a).

³² See TEX. PENAL CODE § 9.32 Practice Commentary.

³³ See *Lane v. State*, 957 S.W.2d 584, 590 (Tex. App.—Dallas 1997, pet. ref'd) (James, J., dissenting) (citing *Hamel v. State*, 916 S.W.2d 491, 494 (Tex.Crim.App. 1996) (retreat without a reasonable belief the actor can escape the imminent threat of harm is not required)).

³⁴ TEX. PENAL CODE § 9.32(a)(3); *Valentine v. State*, 587 S.W.2d 399 (Tex. Crim. App. 1979).

³⁵ TEX. PENAL CODE § 1.07(a)(42); *Richardson v. State*, 906 S.W.2d 646, 649 (Tex.App.—Fort Worth 1995, pet. ref'd).

is entitled to a jury instruction on self-defense.³⁶ Evidence of the prior history of violence, as well as expert testimony regarding the effects of abuse on the defendant's state of mind, is clearly relevant to the issue of whether an ordinary and prudent woman in the defendant's circumstances at the time of the incident would have believed that deadly force was immediately necessary to protect herself against a deadly attack.³⁷

B. Insanity

Years ago, insanity was the predominant defense asserted on behalf of women charged with homicide.³⁸ Women were, in general, much more susceptible then to being labeled hysterical. This was especially true for women who failed to fit traditional stereotypes of femininity by behaving violently, even if their violence was defensive.³⁹ Due to a rise in awareness of domestic violence, battered women who kill their abusers are now much less likely to be viewed as irrational or insane, and the defense of insanity less likely to be a viable trial strategy.⁴⁰ This comports with the literature on "battered women's syndrome" that acknowledges and supports the notion that battered women's choices frequently reflect rational or normal responses to the violence in their lives, rather than any sort of pathology.⁴¹ There may, however, be instances when an insanity defense may be appropriate to the fact situation, although this defense is generally used only as a last resort when no other defensive theory is available. The strategy for each case must depend upon its own facts and circumstances.

Acquittal on the basis of insanity does not guarantee the defendant's freedom. Pursuant to Chapter 46 of the Texas Code of Criminal Procedure, a homicide defendant will be committed to a mental institution, at a minimum, for the period of time necessary for a psychiatric evaluation to be conducted, and may remain under commitment up to the maximum period of time for which she

³⁶ See *Valentine v. State*, 587 S.W.2d 399, 400-01 (Tex. Crim. App. 1979); *Richardson*, 906 S.W.2d at 649; MCCLUNG & CARPENTER, TEXAS CRIMINAL JURY CHARGES § 12:760.30 (Apparent Danger Instruction) (1999); GILL, DANIEL & MCCLUNG, TEXAS CRIMINAL LAWYERS HANDBOOK § 22.120 (Self Defense and the Defendant's State of Mind) (1999).

³⁷ See *Fielder v. State*, 756 S.W.2d 309, 320 (Tex.Crim.App.1988); TEX. CODE CRIM. PROC. § 38.36(b).

³⁸ See Elizabeth Bochnak, WOMEN'S SELF-DEFENSE CASES 29 (1981).

³⁹ See *id.*

⁴⁰ See Diane R. Follingstad, et al., *Factors Predicting Verdicts in Cases Where Battered Women Kill Their Husbands*, 13 LAW AND HUMAN BEHAVIOR 253, 262-65 (1989) (finding in an empirical study that potential jurors preferred self-defense to insanity as a basis for a "not guilty" verdict in hypothetical cases involving battered women who killed their abusive husbands, and attributing that preference to "increased sensitization by media").

⁴¹ See, e.g., Mary Ann Dutton, *Posttraumatic Stress Disorder Among Battered Women: Analysis of Legal Implications*, 12 BEHAVIORAL SCIENCES AND THE LAW 215, 216, 221(1994); Michael Dowd, *Dispelling the Myths about the "Battered Woman's Defense": Towards a New Understanding*, 19 FORDHAM URBAN L.J. 567, 578 (1992); Shelby A. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOWARD L.J. 297, 301-02 (1995).

could have been sentenced if convicted of the crime for which she was prosecuted.⁴² Even if released after the evaluation, the effect of a finding of insanity is likely to create a host of other problems for the defendant, including maintaining custody of her children, or getting and keeping a job.

Legal insanity requires proof by a preponderance of the evidence⁴³ that, due to "severe mental disease or defect," the defendant did not, at the time of the offense, know that her conduct was wrong.⁴⁴ The jury determines whether the legal standard is met; it is not enough that the defendant is mentally ill from a medical standpoint, although a medical determination of mental illness certainly makes up part of the equation. As one court stated, the jury's decision on an insanity plea is made up of "intertwining moral, legal, and medical judgments. . . . The 'moral' elements of the decision are not defined exclusively by religious considerations but by the totality of underlying conceptions of ethics and justice shared by the community, as expressed by its jury surrogate."⁴⁵

A history of the abuse suffered by the defendant, and its effect on her state of mind at the time of the killing, is necessary background for presentation of an insanity defense, as is expert testimony.⁴⁶ If a self-defense claim fails for lack of immediacy or for some other reason, but there is proof that the defendant was terrorized by her abuser, an insanity plea may be advisable as a last resort, particularly when it can be supported by expert testimony that the medical and legal standards were met. A high level of terror, cumulative over years of physical and emotional torture, may render a battered woman temporarily insane surrounding the killing of her abuser.

C. Voluntary Manslaughter

For battered women defendants who cannot successfully mount a self-defense or insanity defense, the punishment phase becomes critically important as the focus shifts to a possible

⁴² See TEX. CODE CRIM. PROC. art. 46.03(4)(d)(1), (7).

⁴³ Insanity is an affirmative defense, which means that the defendant must prove the defense by a preponderance of the evidence. See TEX. PENAL CODE § 2.04(d). This is in contrast with defenses, such as self-defense, which require only that the defendant bear the burden of production. The prosecution carries the burden of persuasion on defenses to negate the defense beyond a reasonable doubt. See TEX. PENAL CODE § 2.03(d).

⁴⁴ TEX. PENAL CODE § 8.01.

⁴⁵ *Graham v. State*, 566 S.W.2d 941, 950 (Tex. Crim. App. 1978) (quoting *U.S. v. Brawner*, 471 F.2d 969, 982-83 (D.C. Cir. 1972)); see also *Schuessler v. State*, 719 S.W.2d 320 (Tex. Crim. App. 1986) (discussing the relationship between medical and legal insanity); *Bigby v. State*, 892 S.W.2d 864, 878 (Tex. Crim. App. 1994) (focusing the question of insanity on "whether a defendant understood the nature and quality of [her] action and whether it was an act [s]he ought to do").

⁴⁶ See *Graham*, 566 S.W.2d at 21 (the circumstances under which the murder took place and the defendant's life experiences are important facts for the jury to consider in assessing an insanity plea); *Easley v. State*, 978 S.W.2d 244 (Tex. App.—Texarkana 1998, pet. ref'd) (evidence of prior abuse admitted; expert evaluation permitted by trial court).

reduction in the sentencing range if “sudden passion” is established. Formerly known as voluntary manslaughter, a lesser included offense of murder, “sudden passion” was recently recodified as a punishment issue reducing the range of sentencing to the level of a second degree felony. Texas case law is rife with stories of battered women convicted of the lesser offense of voluntary manslaughter when charged with murder.⁴⁷ A sudden passion instruction is also available in attempted murder prosecutions.⁴⁸

Section 19.02(d) of the Penal Code provides that, at punishment, a defendant may raise the issue by claiming that the death was caused while she was “under the immediate influence of sudden passion arising from an adequate cause.”⁴⁹ “Adequate cause” is defined as “cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.”⁵⁰ It is important to note that terror is included as one of the emotional responses that are covered by the statute, since the term “sudden passion” typically conjures up the notion of rage or jealousy, based on the historical derivation of voluntary manslaughter as applying to a man who kills his wife and/or her lover when he discovers them in a compromising situation. The level of apprehension must be demonstrated to be severe, to the point of actual terror; “simple fear” is not sufficient to justify the reduction in punishment.⁵¹

“Sudden passion” must be related to a provocation by the deceased, or someone acting with him, at the time of the offense. Evidence of prior discord alone will not meet the statutory standard.⁵² Thus, a linkage between the killing and some act or threat by the abuser near in time to the killing must be established, and any notion that the motive was revenge for prior abuse must be countered and discredited. Evidence of prior abuse, while not sufficient in and of itself, will be relevant and necessary in most cases to explain the context of the deceased’s provocative conduct and the dramatic effects such conduct would have on the deceased’s longterm victim.

D. Defense of Third Persons

Defense of third persons is governed by Section 9.33 of the Texas Penal Code, which incorporates the Code provisions relating to self-defense, Sections 9.31 and 9.32, Texas Penal

⁴⁷ See, e.g., *Richardson v. State*, 906 S.W.2d 646 (Tex.App.–Fort Worth 1995, pet. ref’d); *Halbert v. State*, 881 S.W.2d 121 (Tex.App.–Houston [1st Dist.] 1994, pet. ref’d); *Vann v. State*, 853 S.W.2d 243 (Tex.App.–Corpus Christi 1993, pet. ref’d); *Fielder v. State*, 756 S.W.2d 309 (Tex. Crim. App. 1988); *Valentine v. State*, 587 S.W.2d 399 (Tex. Crim. App. 1979); *Goodman v. State*, 114 S.W.2d 885 (Tex. Crim. App. 1938).

⁴⁸ See *Mims v. State*, 3 S.W.3d 923 (Tex. Crim. App. 1999).

⁴⁹ TEX. PENAL CODE § 19.02(d).

⁵⁰ TEX. PENAL CODE § 19.02(a)(1).

⁵¹ See *Willis v. State*, 936 S.W.2d 302, 308 (Tex.App.–Tyler 1996, pet. ref’d).

⁵² TEX. PENAL CODE § 19.02(a)(2); *Willis*, 936 S.W.2d at 309.

Code.⁵³ The immediacy and proportionality requirements for the use of deadly force in defense of a third persons are substantially the same as those for self-defense. The one major wrinkle in the translation of self-defense to defense of third persons relates to the duty to retreat. The defendant need not retreat unless a reasonable person in her position would believe that a reasonable person in the third party's position would retreat.⁵⁴

The El Paso Court of Appeals broadly interpreted the special evidentiary provisions related to family violence in a case addressing defense of third persons. The trial court in *Henderson v. State*⁵⁵ excluded testimony regarding the history of abuse that the defendant's husband had directed at both the defendant and her sister. Shortly after the defendant separated from her husband, he threatened the defendant and her sister when he saw them out together. Later that same evening, the defendant's sister was physically assaulted, and the defendant shot and killed the assailant, who she mistakenly thought at the time was her husband following through on his earlier threat. When the defendant offered evidence regarding the husband's abuse, the threats that he made just prior to the shooting, and the effect of those threats on the defendant's state of mind at the time of the shooting, the trial court refused to admit it. The Court of Appeals found error in the trial court's refusal based on an expansive interpretation of then-Section 19.06 of the Penal Code, now recodified as Section 38.36 of the Texas Code of Criminal Procedure, which specifically allows evidence regarding the accused and "the deceased."⁵⁶ The court found that, despite the fact that the husband was not "the deceased," he was at least arguably the intended victim, and therefore the evidence should have been admitted.⁵⁷

⁵³ Section 9.33 of the Texas Penal Code provides:

A person is justified in using force or deadly force against another to protect a third person if:

(1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and

(2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

TEX. PENAL CODE § 9.33.

⁵⁴ See *Hughes v. State*, 719 S.W.2d 560 (Tex. Crim. App. 1986) (en banc); *Henderson v. State*, 906 S.W.2d 589 (Tex.App.-El Paso 1995, pet. ref'd).

⁵⁵ See *Henderson*, 906 S.W.2d at 597.

⁵⁶ TEX. CODE CRIM. PROC. art. 38.36(a).

⁵⁷ See *Henderson*, 906 S.W.2d at 597.

Evidence regarding domestic violence was also admitted in *Hamel v. State* in a defense of third person case.⁵⁸ In that case, the defendant was the battered woman's brother; he killed his sister's abusive boyfriend who became violent while the brother was helping his sister move to get away from the boyfriend.⁵⁹ As both *Hamel* and *Henderson* illustrate, domestic violence may be important as context or as evidence supporting other defensive issues and defendants other than battered women.

III. Duress

Duress, like self-defense, is a complete defense, requiring acquittal if successfully asserted. It shares other elements in common with self-defense and is viewed by commentators as presenting similar conceptual and legal challenges when it is asserted by battered women criminal defendants.⁶⁰ Unlike self-defense, however, duress is an affirmative defense to prosecution, requiring the defendant to bear the burden of proof by a preponderance of the evidence.⁶¹ The defense is applicable to any crime under Texas law,⁶² and has been asserted by battered women in prosecutions ranging from murder⁶³ to drug-related offenses⁶⁴ to burglary.⁶⁵

Under Texas law, duress is statutorily governed by Section 8.05 of the Texas Penal Code, which requires a showing that the defendant committed the crime she is charged with "because [s]he was compelled to do so by threat of imminent death or serious bodily injury to [her]self or another."⁶⁶

⁵⁸ 916 S.W.2d 491 (Tex. Crim. App. 1996)

⁵⁹ *Id.* at 492.

⁶⁰ See Meredith Blake, *Coerced Into Crime: The Application of the Battered Woman Syndrome to the Defense of Duress*, 9 WIS. WOMEN'S LAW J. 67, 79-84 (1994).

⁶¹ TEX. PENAL CODE §§ 8.05(a), 2.04(d). See *supra* note 7 and accompanying text, *supra* note 41.

⁶² Other states limit the applicability of duress, for instance, disallowing its assertion in homicide prosecutions, or allowing the issue only in mitigation of punishment, rather than as an affirmative defense. LAFAYE & SCOTT, CRIMINAL LAW 473-74 (1986); BNA CRIMINAL PRACTICE MANUAL § 61.1001.1. While Texas has more stringent requirements for felony prosecutions than for non-felonies, duress is an affirmative defense that negates liability for any crime under Texas law. See *White v. State*, 203 S.W.2d 222, 223 (Tex. Crim. App. 1947); see also *Henley v. State*, 644 S.W.2d 950, 957 (Tex.App.—Corpus Christi 1982, pet. ref'd) ("Duress is an absolute defense, not a matter of mitigation of punishment.").

⁶³ See *Maestas v. State*, 963 S.W.2d 151 (Tex.App.—Corpus Christi 1998, *aff'd*, 987 S.W.2d 59 (Tex. Crim. App. 1999)); *Swails v. State*, 986 S.W.2d 41 (Tex.App.—San Antonio 1999, pet. ref'd).

⁶⁴ See, e.g., *U.S. v. Willis*, 38 F.3d 170 (5th Cir. 1994, *cert. denied*, 115 S. Ct. 2585 (1995)).

⁶⁵ See *Kessler v. State*, 850 S.W.2d 217 (Tex.App.—Fort Worth 1993, no pet.).

⁶⁶ TEX. PENAL CODE § 8.05(a).

If the prosecution is for a non-felony, the defendant need only establish that she was compelled "by force or threat of force."⁶⁷ The statute defines compulsion as existing "only if" the force that is threatened "would render a person of reasonable firmness incapable of resisting the pressure,"⁶⁸ and also disqualifies a defendant from resort to the defense if she "intentionally, knowingly, or recklessly placed [her]self in a situation in which it was probable that [s]he would be subjected to compulsion."⁶⁹

Duress has somewhat similar requirements when raised in response to federal prosecutions, but the defense exists at common law in the federal system and has therefore been more subject to evolution and interpretation than its state-law counterpart. This has been particularly true in cases applying the duress defense to battered women criminal defendants, as conflicting analyses and results have plagued the federal circuits on this issue in particular.⁷⁰

A. Threat of Imminent Harm or Use of Force.

The duress defense is based on compulsion by threat. The most difficult legal hurdle in asserting the defense on behalf of a battered women criminal defendant is that the batterer's threat is often less evident to third parties, e.g., jurors, judges, or prosecutors, than it was to the batterer's long-term victim at the time she was compelled to criminal activity. Frequently, the threat is not expressly stated at the moment that the batterer directs the defendant to commit the crime. Thus, the existence of the threat may only be established through evidence showing the batterer's violent response to the defendant's failure to comply with his directives in the past, combined with her heightened ability to accurately assess of the level of danger that the batterer presented on the occasion in question. These issues may be addressed by an expert on family violence, as discussed in greater detail in chapter four of this manual.

1. **Felonies v. Non-Felonies.** Like self-defense, higher statutory standards must be met when the defense is invoked for more serious crimes. To excuse a felony, the threat must be

⁶⁷ TEX. PENAL CODE § 8.05(b).

⁶⁸ TEX. PENAL CODE § 8.05(c).

⁶⁹ TEX. PENAL CODE § 8.05(d).

⁷⁰ See Susan D. Appel, Note: *Beyond Self-Defense: The Use of Battered Woman Syndrome in Duress Defenses*, 1994 U. ILL. L. REV. 955, 965-970. The current state of the law in the Fifth Circuit is not particularly favorable to battered women criminal defendants asserting the duress defense. See *U.S. v. Willis*, 38 F.3d 170, 175-77 (5th Cir. 1994), cert. denied, 115 S. Ct. 2585 (1995) (holding that evidence that a defendant suffers from battered woman syndrome is not relevant to a duress defense because it is "inherently subjective"). Litigants in federal district courts in Texas should, however, be able to establish a record that would render the unfavorable *Willis* case either inapplicable or distinguishable by presenting evidence regarding the effects of battering that specifically relates to the objective elements of the defense, as well as the imminence requirement. Such a record should effectively bypass the ill-informed *Willis* reasoning. Also, to the extent that the federal district judge is open to a direct challenge to the *Willis* decision, the reasoning in other circuits's decisions on the issue may persuade the trial court to admit evidence regarding the effects of battering. See Susan D. Appel, 1994 U. ILL. L. REV. at 968-70 (discussing and citing numerous federal cases allowing evidence of battered woman syndrome in duress cases).

of *imminent* harm, and the harm that is threatened must be *death or serious bodily injury*. The use of the term “imminent,” rather than “immediate,” has significance, as discussed above with respect to self-defense,⁷¹ and has been the subject of some discussion in appellate decisions addressing the use of the term in the duress context.⁷²

2. **Present Threat.** The evidence must establish a present threat, not a threat to be carried out in the future; and the threat must be of actual and severe harm. A duress defense cannot rely exclusively on evidence of the batterer’s previously articulated threats to kill⁷³ or prior assaults;⁷⁴ such evidence is useful only in providing context for interpreting the batterer’s threatening words or behavior on the occasion in question. And the fact that the batterer directed the defendant’s participation in the crime must be accompanied by evidence showing that the directive carried with it a threat of serious harm for failure to comply.⁷⁵

3. **Not “Generalized” Fear.** In the presentation of evidence relating to the effects of battering, care must be taken to differentiate the defendant’s fear of present harm on the occasion in question from her more generalized fear of the batterer. A history of battering, and expert testimony that such a history causes a psychological response of submissiveness, may run dangerously afoul of case law holding that “generalized fear” is insufficient to establish duress.⁷⁶ While the focus in establishing duress should be on the behavior of the person making the threats,⁷⁷ his pattern of conduct should not be characterized as constituting an “ever-present” threat. Rather than bolstering a duress defense, the notion that the batterer was likely to hunt her down and kill her in the future if she failed to comply with his demands may instead negate the requirement of a present threat of imminent death or serious bodily harm.⁷⁸

⁷¹ See *supra* note 16 and accompanying text.

⁷² See *Kessler v. State*, 850 S.W.2d 217, 221 (Tex. App.—Fort Worth 1993, no pet.) (citing *Devine v. State*, 786 S.W.2d 268 (Tex.Crim.App. 1989)) (discussing the definition of “imminent” in other contexts and holding that “the threat of imminent death or serious bodily injury must be a present threat”).

⁷³ See *id.*

⁷⁴ See *Swails*, *infra* note 78.

⁷⁵ See *Maestas v. State*, 963 S.W.2d 151, 156 (Tex.App.—Corpus Christi 1998, *aff’d*, 987 S.W.2d 59 (Tex. Crim. App. 1999)) (citing *Cameron*, 925 S.W.2d at 250) (that defendant was taking orders from another is insufficient to establish duress).

⁷⁶ See *Cameron v. State*, 925 S.W.2d 246, 250 (Tex.App.—El Paso 1995, no pet.); *Bernal v. State*, 647 S.W.2d 699 (Tex.App.—San Antonio 1982, no pet.).

⁷⁷ See *Maestas*, 963 S.W.2d at 157 (citing *Montgomery v. State*, 588 S.W.2d 950, 953 (Tex. Crim. App. 1979)).

⁷⁸ See *Swails v. State*, 986 S.W.2d 41, 46 (Tex.App.—San Antonio 1999, pet. ref’d).

B. The Standard for Compulsion

Under the statute, the standard for compulsion is objective, incorporating the notion of “a person of reasonable firmness,” from whose perspective the ability to resist the threat is to be measured.⁷⁹ The Corpus Christi Court of Appeals in *Maestas v. State*⁸⁰ incorporated a subjective component, however, in a case involving a battered woman criminal defendant asserting the duress defense. The jury in *Maestas* convicted the defendant, rejecting her claim of duress. After reviewing the defendant’s expert testimony regarding the effects of battering, the Court of Appeals affirmed the jury verdict, finding the evidence on battered woman syndrome unpersuasive because the expert had not personally interviewed the defendant, and could not, therefore, testify about the specific circumstances of the defendant’s abusive history, nor could she offer a reasoned opinion as to whether those particular circumstances would cause the defendant “to react to directives from [her batterer] as if her life or safety depended on compliance.”⁸¹ Thus, the subjective circumstances of the defendant must be incorporated into the perspective of the “person of reasonable firmness” in order to determine whether such a person would be incapable of resisting the pressure created by the threat.⁸²

It is interesting to note that the English common law included a “rule of coercion,” which was a defense available to any wife upon a showing that her husband had ordered her to engage in criminal activity.⁸³ This common law rule is specifically rejected in the Texas statute. Duress by a spouse is a defense under Texas law only if the compulsion applied by the spouse otherwise satisfies the statute.⁸⁴

C. Placement in Compulsive Situation/Opportunity to Escape

The statute specifically provides that a defendant may not avail herself of the defense of duress if she intentionally, knowingly, or recklessly placed herself in a situation in which it is probable that she would be subjected to compulsion.⁸⁵ This requirement is also implicated in discussions in the case law regarding the notion that the defendant is obligated to escape from a

⁷⁹ TEX. PENAL CODE § 8.05(c).

⁸⁰ 963 S.W.2d 151 (Tex.App.—Corpus Christi 1998, *aff’d*, 987 S.W.2d 59 (Tex. Crim. App. 1999).

⁸¹ *Id.* at 156.

⁸² See *Swails v. State*, 986 S.W.2d 41, 43 (Tex.App.—San Antonio 1999, *pet. ref’d*) (describing testimony of family violence expert regarding the effects of the defendant’s history of abuse at the hands of her husband, at whose insistence she became involved in a murder).

⁸³ See GERALD S. REAMEY, CRIMINAL OFFENSES AND DEFENSES IN TEXAS 132 (1987).

⁸⁴ See TEX. PENAL CODE § 8.05(e).

⁸⁵ TEX. PENAL CODE § 8.05(c).

compulsive situation, if escape is available, rather than remain and commit a crime.⁸⁶ This issue has definite import for victims of domestic violence who assert this defense and may present a stumbling block at trial, without adequate preparation and collecting of persuasive evidence that escape was not available and that the defendant's presence at the scene of the crime or otherwise in the compulsive situation was not intentional, knowing, or reckless.⁸⁷

IV. Child-Related Crimes

Battered women are in a special bind when their children are being hurt by the same man who is battering them. The failure to act to protect one's child is one of the few instances in the law where an omission may subject a person to criminal liability,⁸⁸ and battered women are regularly prosecuted for failing to protect their children when their batterers injure or kill the children in the home. They often receive sentences similar to, or even worse than, the person who actually inflicted the injuries.⁸⁹ A battered woman who separates from her abuser may, on the other hand, be subjected to criminal liability if she fails or refuses to release her children to their father for visitation.⁹⁰ Many battered women who stay in abusive relationships do so because believe that they can control, at least to some extent, the batterer's treatment of the children if they are physically present in the home. The law recognizes a limited defense against prosecution for battered women who cannot control their batterer's abuse of the children. Beyond that, however, battered women are fully subject to the wrath of a court system that is bent on protecting the children above all else, including the abuser's other victim, the children's mother.

⁸⁶ See *Swails*, 986 S.W.2d at 46; see also *In re D.L.S.*, 520 S.W.2d 442, 444 (Tex.App.—San Antonio 1975, no pet.).

⁸⁷ See *Swails*, 986 S.W.2d at 48 (Lopez, J., dissenting) (describing the remote location of the scene of the murder and noting the absence of any evidence that the defendant, who had already been beaten three times earlier on the day of the crime, could have found "aid or sanctuary" anywhere in the vicinity if she had run away from the scene).

⁸⁸ See TEX. PENAL CODE § 6.01(c) (limiting criminal liability for omissions); see also TEX. PENAL CODE §§ 22.04(a), 22.041(c) (statutes imposing criminal liability by omission for injury to a child and for abandoning or endangering a child).

⁸⁹ See, e.g., *Chapa v. State*, 747 S.W.2d 561 (Tex.App.—Amarillo 1988, pet. ref'd) (affirming a 99-year sentence imposed on the aunt of a child who failed to prevent the child's death at the hands of her abusive uncle, who also received a 99-year sentence, and acknowledging that the aunt was also a victim of the uncle's violence).

⁹⁰ See TEX. PENAL CODE § 25.03(a).

A. Injury to a Child

Texas Penal Code Section 22.04 recognizes a crime for any act or omission causing injury to a child under the age of 14 by a parent or other person who has undertaken to care for the child.⁹¹ The crime can range from a first-degree felony to a state jail felony, depending on the seriousness of the injury and the defendant's level of intent.⁹²

1. **Affirmative Defense for Certain Family Violence Victims.** Subsection (k)(2) of the statute provides an affirmative defense for family violence victims who can establish that: (a) they were unaware of any prior injuries to the child victim that were unreported; (b) they are also family violence victims of the person who injured the child; (c) they did not cause any injuries to the child themselves; and (d) they did not reasonably believe that an effort to prevent the person from injuring the child would have been effective. At the time of this writing, there are no reported cases applying this affirmative defense.

2. **Duty to Act.** The statute imposes a duty to act not only on parents or managing conservators, but also on others who have "assumed care, custody, or control of a child."⁹³ The legislature further defined this assumption of care as occurring when a person has acted such as "to cause a reasonable person to conclude that [s]he has accepted responsibility for protection, food, shelter, and medical care for a child"⁹⁴ After some debate in the court system,⁹⁵ the Texas Court of Criminal Appeals has held that a duty to act under this statutory provision may be imposed on a step-parent or an unmarried person living with an abusive partner who is battering his own children.⁹⁶

3. **Standards for Failure to Act.** Battered women are prosecuted for omissions under Section 22.04 on several different theories, including: failure to remove the child from the presence of the person known to be abusive to the child, and failure to obtain medical care for the child after injuries have been inflicted by the abuser. The Austin Court of Appeals, in *Dusek v. State*,⁹⁷ discussed and defined the standards that must be met for convictions under these two theories.

⁹¹ See TEX. PENAL CODE § 22.04.

⁹² See TEX. PENAL CODE § 22.04(e), (f), (g).

⁹³ See TEX. PENAL CODE § 22.04(b)(2).

⁹⁴ See TEX. PENAL CODE § 22.04(d).

⁹⁵ See, e.g., *Florio v. State*, 784 S.W.2d 415 (Tex. Crim. App. 1990); *Hawkins v. State*, 910 S.W.2d 176 (Tex. App.—Fort Worth 1995, rev'd, 891 S.W.2d 257 (Tex. Crim. App. 1994)).

⁹⁶ See *Hawkins v. State*, 891 S.W.2d 257 (Tex. Crim. App. 1994).

⁹⁷ 978 S.W.2d 129 (Tex. App.—Austin 1998, pet. ref'd).

An important component of the analysis in *Dusek*, and in any case involving injury to a child, is the “result-of-conduct” doctrine, which requires the defendant’s level of intent to be applied not to the failure to act, but to the result of the offense, usually “serious bodily injury” to the child.⁹⁸ Thus, the defendant must have intended, by her failure to act, to cause serious bodily injury to the child, or failed to act either knowing that serious bodily injury would occur or recklessly disregarding the risk that serious bodily injury would result from her failure to act.

The jury in *Dusek* acquitted the child’s mother of inflicting injury to the child herself.⁹⁹ The mother was convicted instead on two counts of causing serious bodily injury to her son by omission, one for her failure to remove her son from the presence of her fiancé, whom the jury believed was a known threat to her son’s safety, and another for failure to obtain medical care for the 2-year-old child, who had a broken leg and other minor injuries at the time the mother brought him to the hospital for treatment.¹⁰⁰ The evidence indicated that the mother sought medical treatment for the child’s broken leg on the day that it was broken, albeit with some delay due to her lack of transportation and access to a telephone.¹⁰¹

Reversing the conviction for failure to provide medical care, the Court of Appeals stated:

[I]t was not sufficient for the State to prove that appellant failed to provide medical care for a serious bodily injury. Instead, it was necessary to prove that [the child] suffered a serious bodily injury *because* appellant failed to provide him medical care.¹⁰²

Since medical treatment was obtained, and there was no aggravation of the seriousness of the injury or any hindrance to the child’s recovery resulting from any delay in obtaining treatment, the state had failed to satisfy the standard for establishing injury to a child by omission under these facts, and the Court of Appeals reversed the conviction on this count.¹⁰³ These facts are contrasted with other cases imposing liability when an injury is aggravated due to the parent’s delay in obtaining medical treatment, if the parent was aware or should have been aware of the injury, even if the injury was

⁹⁸ *Id.* at 133 (citing *Alvarado v. State*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985) and *Beggs v. State* 597 S.W.2d 375, 377 (Tex. Crim. App. 1980)).

⁹⁹ *Id.* at 132.

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 130-31.

¹⁰² *Id.* at 133 (emphasis added).

¹⁰³ *See id.*

inflicted by another person.¹⁰⁴ The state must prove, however, that the defendant either intended to aggravate the injury, or was aware that the injury was reasonably certain to result from the parent's failure to obtain medical treatment.¹⁰⁵

The *Dusek* court also reformed the judgment on the conviction for failure to remove the child from the presence of the abusive boyfriend, finding that the standard for recklessness had been met, but not the standard for intentional or knowing. The child had not been seriously injured prior to the broken leg, although at the time the child was treated for the broken leg, he had bruises of varying ages on his forehead, trunk, and legs. At one point the defendant admitted that she was aware that the boyfriend regularly got impatient and angry with the child. Thus, the evidence supported the view that the child was most likely a victim of general neglect and abuse, but that the boyfriend had not posed a serious threat to the child's health prior to his leg being broken. This fact scenario is contrasted with other cases in which the prior abuse was so severe that the courts attribute knowledge of it to the child's mother, even if she disputes her awareness.¹⁰⁶

The legal standard, as clarified by the Court of Appeals, is: Did the defendant fail to remove the child from the boyfriend's presence either with the conscious objective or desire to cause serious bodily injury to the child, or with an awareness that serious bodily injury was reasonably certain to result. As stated in the opinion, "Proof of knowing conduct requires more than a showing that the defendant was aware of but consciously disregarded a substantial and unjustifiable risk that the result would occur."¹⁰⁷

The standards enunciated in the 1994 *Dusek* opinion accomplish, at least to some extent, a separation between the harm done by the person inflicting the injuries, and the person prosecuted for failure to remedy injuries either already inflicted (failure to obtain medical care) or looming (failure to remove from the presence of an abuser). That is the challenge in representing battered women in these cases—keeping the understandable outrage about child abuse directed at the abuser, and holding his other victim accountable only for her culpable behavior, and not that of the abuser.

¹⁰⁴ See, e.g., *Thornton v. State*, 994 S.W.2d 845 (Tex.App.—Fort Worth 1999, pet. ref'd) (affirming a conviction of the mother whose boyfriend had tied a string around her 4-year-old son's penis so tightly that it cut all the way through the urethra, and the injury had remained untreated for so long the urethra had grown into surrounding tissue, and the tip of the child's penis, which had been cut off from circulation, had to be removed).

¹⁰⁵ See *id.* at 849.

¹⁰⁶ See, e.g., *Thornton v. State*, 994 S.W.2d 845 (Tex.App.—Fort Worth 1999, pet. ref'd) (child must have been in excruciating pain and blood would have been apparent after mother's boyfriend tied a string around her 4-year-old son's penis); *Hill v. State*, 883 S.W.2d 765 (Tex.App.—Amarillo 1994, pet. ref'd) (wounds from beatings by the child's father were severely infected and some tissue had died, and eight of the child's ribs were fractured); *Lott v. State*, 686 S.W.2d 304 (Tex.App.—Houston [1st Dist.], *aff'd*, 770 S.W.2d 570 (Tex. Crim. App. 1986)) (child died showing signs of bruising on the head and face; skull and rib fractures; burns from ropes, water, and cigarettes; stab and puncture wounds on the face and feet; teeth loose; hemorrhaging in the scrotum and rectum; and malnutrition).

¹⁰⁷ *Dusek*, 978 S.W.2d 129 at 134.

B. Interference with Child Custody

Battered women separating or divorcing their abusers are faced with visitation issues if they share children with their batterer. Frequently, there are concerns about the safety of the children if they are left alone with the batterer, and often, the batterer will hurt or otherwise use the children as a method of terrorizing their mother. It is typical for battered women to consider hiding the children or escaping with them when they separate from their abuser. If a woman undertakes this course of action, she may be subject to prosecution under Section 25.03 of the Texas Penal Code for interference with child custody.

The offense applies to a person who takes or retains a child knowing that doing so is in violation of the express terms of a custody order,¹⁰⁸ or if there is no order in place, knowing that a custody suit has been filed and with the intent to deprive the court of authority over the child.¹⁰⁹ There is a statutory defense for prosecutions under the latter provision if the child is returned to the geographical area of the court's jurisdiction within three days after the date the child is unlawfully taken or retained.¹¹⁰

As recent news stories illustrate, if the mother is protecting the children from known risks of abuse by the batterer, those circumstances may be considered in the civil and criminal proceedings that she is likely to be facing. The statute itself does not, however, create any such exception. Prosecutions for interference with child custody are not all that common, however, and it is often the case that if the parent is willing to return the child to the jurisdiction and seek a civil remedy, *i.e.*, a change in the custody order to restrict the batterer's access to the child, the prosecutor may work with the parent to negotiate an arrangement to avoid criminal charges. However, reliance on a sympathetic or just exercise of prosecutorial discretion may prove to be naive under some circumstances, for instance when the batterer is a prominent citizen of the community or has political connections in the prosecutor's office, or when the batterer has managed to convince the prosecutor's office that the mother's fears are not only invalid, but maliciously fabricated. Before any advice can be given to a client in these circumstances, the legal and political situation must be assessed carefully, and all options explored, so as to minimize the risk of an unfavorable outcome in the civil suit concerning custody of the children, as well as any possibility of criminal liability.

¹⁰⁸ TEX. PENAL CODE § 25.03(a)(1).

¹⁰⁹ TEX. PENAL CODE § 25.03(a)(2).

¹¹⁰ TEX. PENAL CODE § 25.03(c).

Factual Investigation

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CHAPTER THREE

FACTUAL INVESTIGATION

I. Introduction

All cases benefit from careful investigation and fact-gathering, but cases involving domestic violence are likely to require special attention. Violence within the family is generally hidden from the outside world. Therefore, locating evidence to substantiate the defendant's claim that she was the victim of abuse can be like assembling a jigsaw puzzle without the box cover to see the big picture. Prior incidents of domestic violence may have been actively concealed from outsiders, and injuries explained away as resulting from accidents around the house. Even at the time she is arrested, your client may minimize the abuse she has experienced, take responsibility for the abuser's conduct, or display ambivalence about her view of the abuser's role in the violence in her home and in the incident underlying her arrest. Developing the facts to demonstrate your client's history of abuse, and relating it to the defensive theory of the case, may take more patience and legwork than the typical defense case.

This chapter serves as a road map for this endeavor. The first and most important step is listening to your client. *Really* listening. This may be the most difficult and time-consuming aspect of developing the case. An expert can help, and also can be an invaluable resource as you proceed with collecting evidence. Sources of direct evidence of abuse that may be useful in proving the existence of domestic violence are set forth in this chapter. Also included is a list of potential areas for indirect evidence that, with expert testimony, demonstrate that the relationship fit within a pattern that is known as a battering relationship.

In the process of investigating the case, keep in mind that there is no *per se* "battered woman's defense." The history of abuse in each case is relevant to the extent that it supports the particular defensive theory that is advanced, whether that theory is self-defense, defense of others, sudden passion, or duress. An abusive history will not, in and of itself, exonerate your client; rather, it will negate intent, or establish subjective or objective reasonableness of your client's fear of death or serious bodily injury. Do not rely on your client's history of abuse as the theory of the case, but instead, use that history to support the exculpatory legal position at trial.

II. The First Steps

A. Clearing the Way

After determining in the initial interview that the client's history of victimization may play a role in her defense, you should clear the way for an investigation of that history. The defendant's ability to participate meaningfully in the investigation may be limited by a number of pressing problems, particularly if she remains incarcerated pending trial. If she has just killed or seriously

injured her husband or intimate partner, she is likely to be traumatized, requiring crisis psychological intervention. If the incident has resulted in the death or injury of her partner or child, a funeral must be arranged or medical care obtained. If she has children and is separated from them, her entire focus may be on reuniting with them or arranging for their care. She may have lost her job or her housing, alienated her family, and be utterly at her rope's end.

Recognize at the outset that you alone cannot solve all of these problems. Battered women's shelters and their advocates can assist in providing housing, counseling with your client and her children, and other aspects of crisis intervention. Your client may seek help from family members or friends for critical assistance; if so, pay close attention to which of these people she turns to, as these may be the individuals she most trusts and may be valuable in building her defense. Obtaining a bail arrangement will be necessary to offset your client's preoccupation with the welfare of her children and to return her to some measure of stability, so that she can turn her focus to her defense. Typically, battered women defendants are favorable bail candidates, with limited or no criminal histories and minimal flight risk. Domestic violence advocates can assist in putting together a bail package that includes components such as stable housing and counseling for the client and her children.

B. The Client's Chronology

Eliciting the client's story is the first step in the investigation, once her immediate situation has stabilized. Keep in mind that the recovery period for a victim of long term abuse is generally lengthy, and your client will probably be at the very beginning of that process. She may be highly emotional, experiencing more grief and attachment to the batterer than anger about her victimization by him. It will be difficult for her to assess and recount her history with this person with any objectivity, if she is able to talk about it at all. Obtaining the details will be an ongoing process.

For practical strategies in eliciting your client's background, try conducting short and frequent interviews, or writing out questions a few at a time, and asking the client to spend some time each day writing narrative responses. Allowing the client to process the information alone, before she shares it with you, will limit the intrusion of an outsider's point of view, which may cause her to try to shape her responses to satisfy what she believes you expect from her.

Coming from an abusive background, your client will be adept at reading and satisfying the expectations of others. She will also be highly intuitive about the judgments that you might make, even unconsciously, about her history with her abuser. If she reveals that she was raped, for instance, she may at first minimize the trauma of that event. A horrified reaction to her revelation may cause her to conceal other brutalities, particularly if there is an implicit judgment associated with your reaction, *i.e.*, "that is so horrible, how could you have stayed with him afterward?" Although this type of incredulous reaction may be natural, extra caution must be exercised in maintaining your level of awareness. Avoid the expression of prejudices that you either consciously or unconsciously hold about battered women, so that some measure of trust will be developed, allowing the client to open up and tell you her story.

The information about her abuse is not likely to be divulged chronologically. But start by creating a chronological outline of the relationship:

- the date they met and became involved
- dates of marriage and births of children
- work histories, along with names of co-workers
- residential history, along with names of neighbors
- approximate dates of incidents involving law enforcement
- histories of medical or psychological treatment
- dates of any arrests, of both the client and her partner
- any civil court history, inc. protective orders, divorce or custody proceedings.

These more public aspects of the relationship may be relatively easy for the client to discuss. Also, ask about the client's family history and other romantic involvements, and determine whether the client was a victim of physical or sexual abuse in any of those relationships. Discussing other abusive relationships may be easier for your client in the initial stages of information gathering.

Then go back for the more private, interpersonal detail: When and under what circumstances did physical and sexual assaults occur? How did the client respond, both physically and emotionally? Were there honeymoon periods after the violent incidents—cards, letters, flowers, gifts? Ask about emotional abuse—insults, name calling, and other forms of non-physical degradation—remembering all the while that recounting this history to an outsider such as yourself may cause your client to relive the humiliation. Be aware of how your client's shame might play into her ability to describe completely her relationship with her abuser.

Specific inquiry must be directed at the indicia of control in the relationship such as access to money, isolation from family and friends, or control over the client's whereabouts. The client may or may not be aware of the role these issues played in the relationship. Ask about the response that she got from family, friends, law enforcement, co-workers, and medical providers when her victimization was revealed. It is not uncommon, for instance, for family members to encourage reconciliation with the abuser when he is displaying contrition after a violent incident. Evidence of this dynamic may help demonstrate to a jury some of the external factors that kept your client from successfully leaving her abuser. If your client made attempts to leave, get the specifics surrounding those separations and reconciliations. Make notes of witnesses or documents that may be generated by the information that your client provides. Watch for patterns to emerge.

With regard to the specific incident underlying the arrest, make sure to get detailed information about the preceding days and weeks, to determine how the incident played into the

overall pattern of abuse. Were particular “trigger” issues looming, such as a recent separation or the threat of one, causing the abuser to be a heightened risk to your client? Evaluate how the incident fits within the patterns identified in the historical information obtained from the client, and into the defense’s theory of the case.

C. Consultation with an Expert Witness

An expert on domestic violence can be extremely valuable in the investigative stage of the case. The expert can advise the attorney on client interview techniques as well as methods for approaching fact witnesses. With knowledge of common dynamics of the battering relationship, the expert may have ideas for identifying evidence that will demonstrate the abuse and can link that evidence to the patterns and profiles that are typical of abusive relationships. In addition, the expert may be helpful in locating services for the client: shelter placement, individual and family therapy, referrals to treatment programs, and court accompaniment by victim advocates. Perhaps most importantly, the expert can help the attorney identify and dispel his or her own misconceptions and prejudices about battered women, enabling the attorney to do so with other institutional players in the criminal justice system—the prosecutor, judge, and jury. For information on locating and using an expert witness, see chapter 4 of this manual.

III. Investigating Domestic Violence

With a grounding in the dynamics of domestic violence, an attorney can begin the process of collecting evidence to demonstrate at trial the role that the defendant’s victimization played in the incident giving rise to her arrest. As set forth below, both direct and indirect evidence of abuse will be valuable in demonstrating the abusive relationship: Direct evidence for proof of the violence directed at your client, and indirect evidence showing the dynamic of the relationship, which would support expert testimony regarding the effects of battering on your client’s state of mind. Direct evidence includes evidence that violence was directed at the defendant on the occasion in question, as in a self-defense scenario, and also on prior occasions.

A. Direct Evidence

1. **Photographs and Videotape of the Scene and the Participants**—Visiting the scene where the incident occurred is the most important step of the investigation. Bring a camera or videocamera with you. The physical context in which the incident occurred may become an issue, e.g., if the abuser was blocking your client’s exit from a room or from the house. Photographs of your client or the children taken at the time of arrest may not show bruises, which do not appear for a day or more. Capture this important evidence with a camera in the days following the arrest. If possible, obtain photographs of the batterer or the children taken at or around the time of the incident. Photograph or videotape parts of the house that show damage resulting from violent behavior, e.g., holes punched in the walls or doors, or damaged personal property or clothing.

2. **Witnesses to the Incident**—All witnesses present at the incident or in the immediate aftermath must be interviewed and their statements obtained. Examples of such witnesses include children, neighbors, roommates, police officers, victim services workers, emergency medical providers, hospital staff, nurses, and doctors, and any friends or family members present at the scene. Obtain detailed statements from all witnesses while the incident is fresh in their minds. Early statements are less likely to be influenced by any loyalty that the witnesses may have to the batterer or his family. Taped or written statements will enhance later recall of the details of the incident.

3. **Client's Statements** — Obtain copies of all statements made by your client at the time of the incident. Be prepared that these statements may include expressions of remorse or guilt. Consider arranging for the client to take a polygraph for use in negotiations with the prosecutor.

4. **The 911 Call**—If a telephone call was made to 911 regarding the incident, obtain a copy of the tape made of the call. If 911 calls were made for any prior domestic disturbances, obtain copies of them as well.

5. **Witnesses to Prior Assaults**—Identify and interview witnesses who have knowledge of prior assaults by the abuser against your client, either by seeing the assault or the injuries inflicted on your client, by overhearing the disturbance in the home or elsewhere, or by hearing statements made by the abuser about the assault. Such witnesses may include: children living in the home; the client's co-workers, friends, or family; neighbors or housemates; law enforcement called to the scene; medical providers treating the injuries; counselors or battered women's advocates. If family or friends were aware of the violence, and talked to your client about her situation, interview them. Law enforcement officers who have had to go to the same home for repeated domestic disturbance calls may have valuable information about the history of abuse, and a law enforcement officer serving as a witness for the defense can be enormously persuasive. The batterer's friends and family should be contacted early in the case, when they may be forthright about the batterer's violent tendencies or maltreatment of your client. If so, obtain written or taped statements from them because, as time passes, they are likely to become hostile toward your client and refuse to cooperate with her defense.

6. **Police Records and Prior Criminal History**—For prior incidents of violence, obtain copies of police records, certified copies of charging instruments or judgments of conviction, and transcripts of any proceedings. Identify and interview persons involved in the process, including law enforcement officials, prosecutors, correctional officers, and probation officers.

7. **Medical Records**—If your client sought medical treatment for any injuries she sustained during the course of the relationship, obtain copies of the medical records. Interview any providers or staff who saw your client when she was treated. Determine whether the medical providers suspected that the injuries resulted from an assault, regardless of her explanation, and whether they talked to her about violence in the home or referred her to a social worker.

8. **Other Corroborative Evidence**—Identify and, if possible, either photograph or obtain any weapons used by the batterer in prior assaults, or any items of property or clothing that

were damaged by the batterer. For any guns owned by the batterer, determine whether they were properly registered, and/or whether his ownership or possession of guns was a violation of probation, parole, or other legal restrictions (e.g., if he was subject to a protective order).

9. **Civil Court Documentation**—Obtain certified copies of relevant documents in any civil court proceedings, such as divorce or custody litigation, or protective order proceedings. If any contested hearings or trials were held, determine who was called to testify as a witness, and the subject matter of any testimony. Obtain transcripts of any testimony relevant to the present case. Interview the civil attorney representing your client for information about the civil court proceedings and any factual background previously explored by that attorney.

Investigate whether the batterer violated any orders entered for the protection of your client, and what response, if any, the violations elicited from the court or prosecutor. The entry of protective orders, and the batterer's defiance of them, demonstrate that the client was actively trying to protect herself and her children, and was unable to get away from her abuser. Determine whether the incident giving rise to your client's arrest was related to the proceedings in civil court, e.g., did the incident occur just prior to a trial scheduled in the divorce case? Or did he show up at her home the day after her protective order expired? The timing of these occurrences may demonstrate the escalation to life-threatening violence by the batterer, and your client's reasonable fear of him, due to his loss of control and need to recapture or punish her.

10. **Counseling Records**—Subpoena records from any battering intervention program or drug or alcohol counseling that the batterer may have been ordered to attend as a result of a prior arrest. To the extent possible, interview the mental health providers to determine whether the batterer engaged meaningfully in any of these recovery programs, and whether he admitted the abuse in the course of those programs. Obtain copies of all marital counseling records, as well as records of any psychological or psychiatric treatment for either the batterer or your client. Investigate the possibility of calling your client's present counselor as a witness—talk to the counselor and inquire about any repercussions that testifying may have on the client's on-going therapy. Determine the extent to which the counselor presents the defendant as passive, damaged, or psychologically impaired, as opposed to resourceful in developing survival mechanisms and rational in her assessment of risks in a dangerous environment. The determination of whether to use the counselor as a witness may turn on how well her explanation of your client's response to the violence fits within the defense's presentation of the client's mental state at trial.

11. **Defendant's Prior Attempts to Stop the Violence**—Your client may have taken steps to stop the violence by reaching out in different ways to different resources. Investigate any attempts that she made to contact law enforcement, battered women's shelters, family, friends, or employers. Again, lack of responsiveness to your client's requests for assistance from institutions such as law enforcement or the courts will help the jury understand the barriers to "just leaving" the abuser. Review the attempts that your client made to see if any patterns emerge in relation to the batterer's escalation of violence, in the form of threats or acts of retaliation, or homicidal or suicidal attempts by him surrounding her efforts to leave.

B. Indirect Evidence

1. **Indicia of Control: Money, Cars, Housing**—Obtain documents related to areas of the relationship that the batterer used to control your client. For instance, bank accounts and credit cards may have been solely under the control of the batterer, excluding your client from access to any money. Houses are likely to be owned solely in the name of the batterer, and your client may not have ownership or access to any vehicle. Bank records, deeds, and title instruments demonstrate the batterer's control through these day-to-day aspects of your client's life.

2. **Your Client's Work Records**—If your client was employed while she was involved with the abuser, her work records may substantiate abuse. Her record of attendance may show absenteeism following particular incidents of abuse. If the batterer called or harassed her at her place of employment, there may be a record of those incidents, or witnesses at the workplace who recall the harassment. Also, if the employer refused to allow time off for your client to attend a hearing, your client's inability to follow through on a protective order may be better understood by the jury.

3. **Work Records of the Abuser**—Subpoena the batterer's work records to determine whether those records substantiate the abuse. Although many batterers maintain a charming and affable public persona, some have a history of violent confrontations with persons other than their intimate partners, and may have had some difficulties at the workplace. Also, batterers who have lost jobs or been demoted may act out their stress and humiliation by battering their spouse or intimate partner, and work records may link up particular violent incidents with workplace stressors such as these. If the batterer has a history of difficulties in the work place, his work records may also identify "bad character" witnesses for the defense.

4. **Children's School Records**—School teachers, nurses, and school records may provide information about the effects of the violent home atmosphere on the child, including behavioral abnormalities, such as emotional outbursts or fearful personalities, marks or bruises on the child if the child is a victim of abuse, or statements made by the child or either parent regarding any occurrences at the home.

5. **Historical Photographs**—Photographs taken of your client, the batterer, and their children over the course of the relationship sometimes reveal the dynamics of control. For instance, pictures taken of your client at the beginning of the relationship may illustrate a change in her appearance over the course of the relationship as she became more timid or downtrodden. The "honeymoon" periods may show up in photographs. There may be photographs where bruises or other injuries are evident. In photographs of your client and the abuser together, the body language of the couple may indicate his physical domination over her. The same is true of videotapes of the family, if any exist. These types of photographs and videotape will help the jury visualize the dynamic of the relationship as your client testifies about the history of abuse.

6. **Other Victims**—In your review of the batterer's criminal history, identify and interview any other victims of his violence. Consider contacting any prior spouses or significant

girlfriends, and review any divorce or other civil or criminal proceedings involving these persons. The witnesses may be reluctant to testify if they have been intimidated by the batterer or his family; if so, take measures for their protection while awaiting trial.

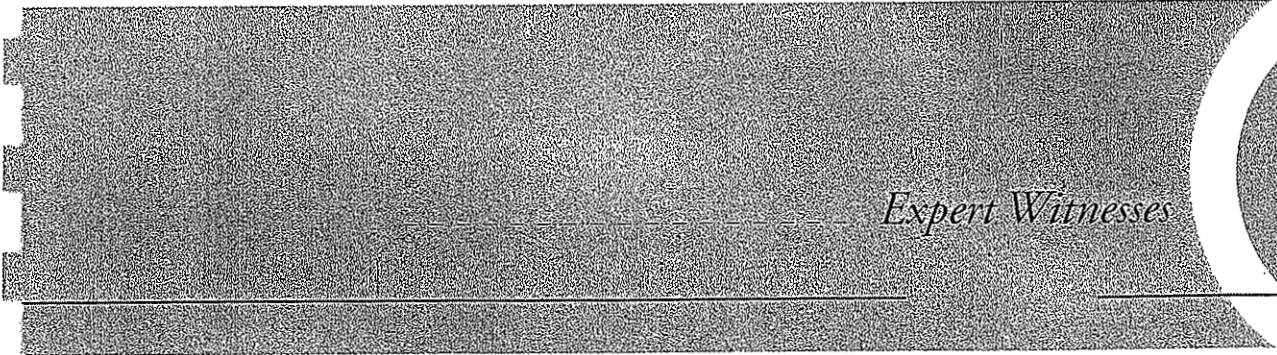
IV. Investigating the Prosecutor's Case

In addition to identifying witnesses and evidence favorable to your case, care should be taken to investigate areas that are likely to be included in the prosecutor's case. Are there any witnesses who may testify that your client was the aggressor in prior incidents of violence? Has your client had any history of physical punishment of the children, or is there anyone who may say that she has? Are there any witnesses that the prosecutor has identified who were previously unknown to you? Do any of these witnesses have a motive to lie about your client? Are there any other "bad acts" by your client that may be presented by the prosecution at trial? Prepare motions in limine to exclude prior bad acts or embarrassing information about the battered defendant, *e.g.*, a prostitution conviction, or involvement with drugs or alcohol. Get a copy of your client's criminal history, and develop testimony to rebut any negative inferences that may be drawn, in the event that the prior history is admitted into evidence.

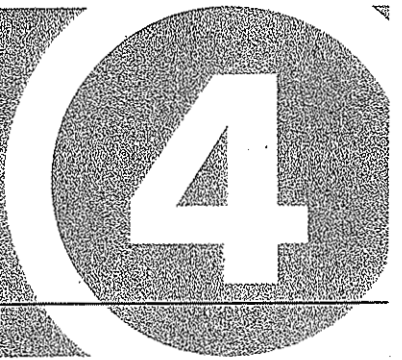
Review all of the physical evidence related to the incident underlying the charge, with an expert if appropriate, including any weapons, photographs of injuries, the medical examiner's report, or any other physical evidence at the scene. Make sure that the physical evidence comports with your client's statements regarding the events. Get to know everything you can about any experts the State uses, as well as how the prosecutors question experts employed by the defense.

V. Conclusion

In investigating your client's case, you are working to recreate the context, the big picture, in which your client ultimately acted. Again, the intent is not to try to draw excuses for her behavior but to explain to outsiders who most likely have not experienced abuse how an individual would make such choices, and why those choices may turn out to be rational once the context is clearly understood. Working the case, getting the details, being able to depict in gut-wrenching detail the forces at work keeping your client in her abused role in the relationship will be necessary to mounting a successful defense, or at least seeking a just result for this victim of domestic violence.



Expert Witnesses



CHAPTER 4

EXPERT WITNESSES

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CHAPTER 4

EXPERT WITNESSES

I. Introduction

When lawyers contemplate using expert witnesses, they typically envision sponsoring the expert's testimony at trial. However, experts in battering cases may provide professional assistance at other phases in the process, for instance during the investigation, at the grand jury stage, in conjunction with a motion to dismiss, at sentencing hearings, or at any time during the process when negotiations are undertaken with the prosecutor.¹

Experts can also assist the defense team in other important aspects beyond formal participation in the legal process. For instance, an expert may be extremely valuable in locating and accessing resources necessary for the client's physical and emotional well-being and in managing the client and her developing reactions to the trauma she has experienced. The expert should also prove useful as a consultant as the attorney analyzes the case under various defensive theories, and can advise the attorney on methods for approaching and interviewing witnesses and preparing the client and other witnesses for testifying. Some commentators have urged that the expanded use of experts during trial preparation can make the difference between a conviction and a not guilty verdict in cases involving the defense of battered women.² Indeed, it has been suggested that failure to use an expert may constitute ineffective assistance of counsel.³

Testimony by an expert serves to explain the context of the defendant's actions. Known as "social framework testimony," domestic violence experts familiar with the social science research provide both the social and psychological background necessary for the evaluation and determination of issues that arise in criminal proceedings involving battered women.⁴ In addition to general

¹ Blackman, J., *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RIGHTS LAW REPORTER 227 (1986).

² Maguigan, H., *A Defense Perspective on Battered Women Charged with Homicide: The Expert's Role During Preparation For and Conduct of Trials*, Working Paper for Women Judges' Fund for Justice (April 1995 Roundtable).

³ Cf. *Easley v. State*, 978 S.W.2d 244, 250-51 (Tex.App.-Texarkana 1998, *pet. ref'd*) (claim of ineffective assistance of counsel overruled on the record, which reflected that defense counsel had requested a psychiatric evaluation of mental status and competency to stand trial and that such an evaluation was conducted; the results, which were not a part of the record, may have influenced defense counsel not to make an *ex parte* request for an expert to testify as to the defendant's state of mind at the time that she killed her abusive husband).

⁴ Mary Ann Dutton, *Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women* at 2 [hereinafter *Impact of Evidence*] in U.S. DEP'T OF JUSTICE, *et al.*, THE VALIDITY AND USE OF

information about battering and its effects, an expert may provide case-specific analysis of a particular defendant's actions and perceptions, for example, by examining carefully the imminent danger and retreat issues in a case in which a battered woman has killed her abuser. General testimony is typically useful in breaking down misguided stereotypes by judges and juries and explaining the coping mechanisms that may appear to be dysfunctional behavior by victims in these cases.⁵

The most important witness to the defendant's history and state of mind is usually the defendant herself. While an expert can assist the fact finder in evaluating the evidence,⁶ the expert's testimony should complement the factual data provided by the defendant and other witnesses, helping to make the defendant's experience plausible and understandable by the judge or jury. Some experts may feel that their testimony is useful only in conjunction with testimony from the battered client, at least under certain circumstances.⁷ Defense counsel should not feel that expert participation is required, at trial or at any other phase of the case, if expert testimony does not advance the defensive theory or otherwise enhance in the presentation of the case. Counsel should make informed, professional decisions about if and when to use an expert, and should remain critical about the expert's usefulness throughout the case.

Indeed, commentators caution against over reliance on the expert's testimony at trial, and emphasize the need for the attorney to tie the expert's testimony to the particular facts of the case and the legal elements of the defense presented.⁸ As clarified in recent studies, use of an expert witness on battering and its effects, although helpful to the deliberative process, does not guarantee an acquittal on any criminal charge against a battered woman defendant.⁹ Expert testimony is most useful if the expert can communicate an understanding of the defendant's conduct within the context of the battering relationship and of the social problem of domestic violence generally, and if the

EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT (1996).

⁵ *Id.* at 3-4.

⁶ *Id.*

⁷ Blackman, J., *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RIGHTS LAW REPORTER 231-232 (1986).

⁸ See, e.g., Schneider, E., *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RIGHTS LAW REPORTER 194, 206 (1986).

⁹ Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases* at 53 [hereinafter *Trend Analysis*] in U.S. DEP'T OF JUSTICE, *et al.*, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT (1996).

defense attorney understands the complexities of domestic violence, effectively utilizes the expert throughout the case, and successfully links the expert's testimony to the specific issues in the case.¹⁰

II. Standard for Admissibility of Expert Testimony

The standard for admitting expert testimony has been the subject of intense scrutiny since the Texas Court of Criminal Appeals' 1992 decision in *Kelly v. State*.¹¹ Since 1992, there have been a number of "landmark" cases, each coming on the heels of another, from both state and federal courts, adopting, clarifying, or applying in particular contexts the newly enunciated criteria for admissibility of expert testimony.¹² The resulting explosion of discussion and controversy about the use of expert witnesses has been the subject of more treatises, conferences, research papers, and practice guides than can even be enumerated here. With all its perceived complexities, these new standards apply to expert testimony offered under either the Texas or federal evidentiary rules in criminal trials involving battered women.

The Texas Court of Criminal Appeals held in its 1998 decision in *Nenno v. State*¹³ that "non-scientific" expert testimony is subject to a reliability test similar to the *Kelly* test for "scientific" testimony. When proffering expert testimony regarding domestic violence under the Texas Rules of Evidence, defense counsel must be prepared to show:

- (1) that domestic violence and its effects is a legitimate field of expertise;
- (2) the subject matter of the expert's testimony is within the scope of that field of expertise; and
- (3) the expert's testimony properly relies upon and/or utilizes the principles involved in the field.¹⁴

¹⁰ *Impact of Evidence*, *supra* note 4, at 7.

¹¹ 824 S.W.2d 568 (Tex. Crim. App. 1992).

¹² See, e.g., *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998).

¹³ 970 S.W.2d 549 (Tex. Crim. App. 1998).

¹⁴ *Id.* at 561. The enunciation of this standard for "non-scientific" expert testimony calls into question the Waco Court of Appeals' previous decision in *Fowler v. State*, 958 S.W.2d 853, 865 (Tex. App.—Waco 1997, *aff'd* 991 S.W.2d 258 (Tex. Crim. App. 1999)) that a domestic violence expert's testimony did not satisfy the standard for "scientific" expert testimony under the 1992 *Kelly* criteria.

A report commissioned by the U.S. Department of Justice under a federal legislative mandate in the 1994 Violence Against Women Act¹⁵ should provide substantial persuasive authority to the trial court on the legitimacy of the field. This report, entitled *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials*,¹⁶ outlines the medical and psychological bases for the interdisciplinary study of domestic violence and its effects on victims. Additional evidence of legitimacy may be offered through the expert regarding the extent of academic and clinical efforts that are directed at understanding domestic violence and treating its effects, as well as the breadth of community institutions, such as shelters and batterer intervention programs, that function with the use of specialized personnel to aid victims of domestic violence and their perpetrators in various capacities. Armed with this evidence, the trial judge should feel confident that the gatekeeping function it has been assigned in the *Kelly* line of cases has been satisfied.

In addition to satisfying the reliability standard, the defense must establish that the expert is qualified and that the testimony is relevant to a fact issue to be determined by the court. The testimony must be "sufficiently tied to the facts of the case that it will assist the trier of fact in resolving a factual dispute."¹⁷ The subject matter of the testimony must therefore relate the effects of battering to the legal issues to be determined by the judge or jury, *e.g.*, the defendant's ability to assess the danger of her situation or the reasonableness of her fear of immediate death or serious bodily injury in light of her history of battering. It is not the expert's role to testify that the defendant was, in fact, a "battered woman,"¹⁸ nor for the reasons set forth below should the expert be called upon to testify that the defendant suffers from "battered woman's syndrome."

Finally, the issues surrounding admissibility and scope of expert testimony regarding a defendant's history of family violence must be viewed in light of the 1994 legislative enactment of Article 38.36(b) of the Texas Code of Criminal Procedure. That provision requires trial courts to allow expert testimony on the effect of family violence on the defendant's state of mind in murder prosecutions in which self-defense or defense of others is raised.¹⁹ And the courts have in fact admitted such expert testimony.²⁰ In addition, family violence experts have testified for battered

¹⁵ 42 U.S.C.A. §14013 (2000).

¹⁶ Malcolm Gordon & Mary Ann Dutton, *Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women* at 17 [hereinafter *Validity*], in U.S. DEP'T OF JUSTICE, *et al.*, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT (1996).

¹⁷ See *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549 at 556 (Tex. 1995).

¹⁸ An expert cannot testify that a particular witness is truthful, or that a class of persons to which the witness belongs is truthful. See *Yount v. State*, 872 S.W.2d 706 (Tex. Crim. App. 1993) (*en banc*).

¹⁹ TEX. CODE CRIM. PROC. art. 38.36.

²⁰ See, *e.g.*, *Richardson v. State*, 906 S.W.2d 646, 648 (Tex. App.—Fort Worth 1995, *pet. ref'd*); *Todd v. State*, 1998 WL 196187 (Tex. App.—Dallas 1998).

women criminal defendants in recent cases involving duress defenses,²¹ and at punishment phase on the issue of sudden passion.²² Thus, the new standard may require defense counsel to exercise care in preparing to offer expert testimony, but it should not be considered a major impediment if defense counsel intends to present testimony by an expert witness at trial in defense of a battered woman criminal defendant.

III. Obtaining an Expert

The process of obtaining an expert witness must be undertaken at the earliest possible time in the case, as locating an expert may be time-consuming and/or difficult. In addition, if the client is indigent, defense counsel must undertake the process of seeking appointment of an expert by the court.

A. Locating and Selecting an Expert

If funds are available for hiring an expert chosen by the defense, the selection of an expert should follow traditional criteria. The expert should be knowledgeable in the field of domestic violence, informed of current social science literature and empirical studies, able to communicate effectively with lay persons, and should, above all, have direct experience dealing professionally with battered women. This last criterion has been found to be of utmost importance. A group of judges, defense attorneys, prosecutors, and advocates studying the impact of expert testimony in criminal trials involving battered women concluded that "[e]xpertise based on experience working with battered women was considered . . . to be essential, regardless of the expert's other qualifications."²³

A number of professional types may fit these requirements: psychologists, psychiatrists, social workers, or other mental health professionals. While there has, for good reason, been a substantial effort to broaden the category of domestic violence experts to include non-professionals, such as shelter workers, police officers, trauma technicians, hotline workers, or victim advocates,²⁴ the legal and practical standards for admitting expert testimony indicate that proffers of testimony

²¹ *Swails v. State*, 986 S.W.2d 41, 43-45 (Tex. App.-San Antonio 1999, *pet.ref'd*); *Maestas v. State*, 963 S.W.2d 151 (Tex. App.-Corpus Christi 1998, *aff'd*, 987 S.W.2d 59 (Tex. Crim. App. 1999)).

²² *Lane v. State*, 957 S.W.2d 584, 587, n.2 (Tex. App.-Dallas 1997, *pet. ref'd*).

²³ *Impact of Evidence*, *supra* note 4, at 13.

²⁴ *Id.* at 13.

by non-professional experts is risky at best.²⁵ Use of these non-professionals should be encouraged, however, for case development and potential testimony as fact witnesses. In order to maintain confidentiality, it is recommended that the defense counsel employ these non-professional experts as a part of the defense team, e.g., as consultants or investigators. When interviewing potential expert witnesses, evaluate their "presentation," i.e., their ability to convey the information known to them effectively and persuasively, in a professional but sympathetic manner, without over reliance on jargon.

The battered woman's shelter in the local community would be an excellent first contact for leads on potential experts. Frequently, shelters have psychologists or other counselors on staff, or have contacts with professionals in the community who are trained in domestic violence. Typically, experts within the community are preferred to experts from out of town, but if no appropriate expert can be found within the community, contact state or national organizations dealing with domestic violence, such as the Texas Council on Family Violence, located in Austin, Texas; the National Clearinghouse for the Defense of Battered Women, located in Philadelphia, Pennsylvania; or the Family Violence Prevention Fund, located in San Francisco, California. In addition, university, college, or junior college departments in fields such as psychology, sociology, social work, criminal justice, or women's studies may be good sources for experts on domestic violence, although, again, care should be taken that the expert understands "the phenomenology of battered women's experience through direct contact with battered women—rather than through academic endeavors alone."²⁶

B. Seeking Court Appointment or Funding

In the event that the client is indigent, defense counsel should pursue appointment of an expert by the court. A line of cases beginning with the U.S. Supreme Court's decision in *Ake v. Oklahoma*,²⁷ followed by the Texas Court of Criminal Appeals' *en banc* decision in *DeFreece v. State*,²⁸ provides a basis for seeking court appointment of a domestic violence expert to assist in all aspects of the defense of a battered woman criminal defendant. An indigent defendant's right to the appointment of expert upon a proper showing is of constitutional proportions,²⁹ and the failure of a trial court to appoint an expert, or to authorize funds for defense counsel to employ an expert, has

²⁵ See *Fowler v. State*, 958 S.W.2d 853, 865 (Tex.App.—Waco 1997, aff'd, 991 S.W.2d 258 (Tex. Crim. App. 1999)).

²⁶ *Impact of Evidence*, *supra* note 4, at 7.

²⁷ 470 U.S. 68 (1985).

²⁸ 848 S.W.2d 150 (Tex. Crim. App. 1993) (*en banc*).

²⁹ *Id.*; *Ake v. Oklahoma*, 470 U.S. 68 (1985).

been found to be structural error, rather than trial error, and therefore not subject to harmless error analysis.³⁰

To obtain appointment of an expert or authorization for funds to hire one, a pretrial motion must be filed with the court.³¹ The motion may, and should, be made *ex parte* to protect against disclosure of attorney work product to the prosecution.³² To be successful, the motion must include evidence and argument demonstrating that an expert is needed to address an issue that is likely to be a significant factor at trial.³³ Further discussion of the building blocks for an effective motion for appointment of an expert, or for funds for employing an expert, follows below.

An indigent defendant is not entitled to an expert of her own choosing,³⁴ however, it is not only appropriate but also advisable to include in the motion one or more suggestions for specific experts who are qualified to testify in the appropriate field of expertise, domestic violence and its effects on victims.³⁵ The motion should clearly request expert assistance regardless of whether the court appoints an expert, who is either selected by the court or suggested by the defense, or approves funding for an expert to be chosen by the defendant.³⁶

³⁰ See *Rey v. State*, 897 S.W.2d 333, 345-46 (Tex. Crim. App. 1995); *Rodriguez v. State*, 906 S.W.2d 70, 76 (Tex.App.-San Antonio 1995, *pet. dismiss as improvident granted*, 924 S.W.2d 156 (Tex. Crim. App. 1995)). But see *Lighteard v. State*, 982 S.W.2d 532, 535-36 (Tex. App.-San Antonio 1998, *pet. refused*) (conducting harmless error analysis, but finding harmful error).

³¹ Article 26.05(a) of the Texas Code of Criminal Procedure requires prior approval of expenses for expert's fees in appointed cases.

³² See *Williams v. State*, 958 S.W.2d 186, 193-94 (Tex. Crim. App. 1997) (en banc). A trial court's failure to grant an *ex parte* hearing is subject to harmless error analysis, but was a sufficient basis in the *Williams* case to warrant reversal on punishment, although not guilt. *Id.* at 194-95. The name and address of any expert expected to be used at trial is, however, subject to disclosure to the prosecution, upon their motion, under the newly amended article 39.14, Texas Code of Criminal Procedure.

³³ See *Taylor v. State*, 939 S.W.2d 148, 152 (Tex. Crim. App. 1996) (en banc); *Rey v. State*, 897 S.W.2d 333, 339-43 (Tex. Crim. App. 1995) (en banc); *Rodriguez v. State*, 906 S.W.2d 70, 75 (Tex.App.-San Antonio 1995, *pet. dismissed as improvident granted*, 924 S.W.2d 156 (Tex. Crim. App. 1995)).

³⁴ See *DeFreece v. State*, 848 S.W.2d at 159.

³⁵ See, e.g., *Rey v. State*, 897 S.W.2d 333, 335, 339 (Tex. Crim. App. 1995) (en banc) (describing trial court's consideration of the specific expert identified in defendant's motion for appointment of an expert pathologist).

³⁶ See *In the Matter of J.E.H.*, 972 S.W.2d 928, 930 (Tex. App.-Beaumont 1998, *pet. denied*) (analyzing whether a motion for funds included a request for expert assistance pursuant to the court's appointment, noting that an indigent defendant does not have a constitutional right to an expert of her own choosing).

The scope of assistance requested from an appointed expert is not limited to trial testimony. The Texas Court of Criminal Appeals has held repeatedly that a defendant has a due process right to an expert for technical assistance in every aspect of the defense, including help in evaluating various defensive theories and their strengths, identifying weaknesses in the state's case, preparing counsel to cross-examine opposing experts, and developing and testifying regarding an opinion on the issues in the case.³⁷ The inspection of evidence has also been specifically identified as an appropriate use of an appointed expert,³⁸ and an appointed expert may be required to address issues unique to the punishment phase of a criminal proceeding.³⁹

A motion for appointment of an expert or for funds to employ an expert should include the following:

- a description of the type of expert assistance requested, *e.g.*, a domestic violence expert, mental health expert, or psychologist familiar with family violence;
- identification of the stage at which assistance is needed, *e.g.*, investigation, pre-trial, trial, or sentencing before jurors or judge;
- a description of the type of assistance required, *e.g.*, psychological testing and evaluation of the defendant, interviews of the defendant and key witnesses, review or examination of documents or other evidence, development of a social history, consultation with defense counsel regarding the effects of battering on the defendant's state of mind, and/or testimony at trial or sentencing;
- names of suggested experts, including their qualifications, rates, expected range of total costs for services, and any necessary discussion regarding the reasonableness of rates or total costs;
- the factual basis underlying the need for expert assistance, *e.g.*, a description of prior history of abuse inflicted by the batterer on the defendant;
- defense theories or themes linking the domestic violence issue to the elements of the case;

³⁷ *Rey*, 897 S.W.2d at 343; *DeFreece*, 848 S.W.2d at 159.

³⁸ *Rodriguez v. State*, 906 S.W.2d 70, 74 (Tex. App.—San Antonio 1995, *pet. dismissed as improvident*, granted, 924 S.W.2d 156 (Tex. Crim. App. 1995)).

³⁹ *In the Matter of J.E.H.*, 972 S.W.2d 928 (Tex.App.—Beaumont 1998, *pet. denied*).

legal authority and argument for an expert in the case, which should include reference to the U.S. Department of Justice report, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act*,⁴⁰ and

evidentiary documentation, e.g., affidavits, mental health records, police reports or conviction records related to prior incidents of domestic violence.

IV. Prosecutor's Use of Expert Witness

The use of expert witnesses, in the past at least, was typically the province of the prosecution.⁴¹ Article 39.14 of the Texas Code of Criminal Procedure now provides for discovery of the name and address of any expert that may be used at trial. To obtain disclosure of experts expected to be called by the prosecution, defense counsel must file a motion requesting the information and obtain an order from the court specifying the time and manner in which the information must be disclosed. Although the new code provision does not state any sanction for failure to disclose the information, defense counsel should seek to have any undisclosed expert testimony excluded at trial, by reference to case law applying the rules of evidence to similar circumstances in civil litigation.⁴²

V. Substance of Testimony

A. "Battered Woman Syndrome" is not the Issue

Although much work in the 1970s and 1980s was directed at constructing and defining "battered woman syndrome,"⁴³ experts today have concluded that the use of that term to refer to the phenomena associated with a battering relationship is inadequate and misleading.⁴⁴ Use of the term

⁴⁰ A copy is on file with the author, if not otherwise available to counsel.

⁴¹ See Guyer, Ronald P., *A Lawyer's Report on Expert Witnesses*, presented at TCDLA Conference in South Padre Island, Texas, July 2000.

⁴² *Id.* at 2.

⁴³ See, e.g., Blackman, J., *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RIGHTS LAW REPORTER 227, 228-230 (1986) (setting out four "components" or "characteristics" of the syndrome).

⁴⁴ *Impact of Evidence*, *supra* note 4, at 4; *Validity*, *supra* note 16, at 17.

“battered woman’s syndrome” suggests that there is a particular set of symptoms or diagnostic criteria that can be applied to determine whether a victim of domestic violence suffers from a specific condition that is acknowledged within the scientific or clinical psychological community, when in fact no such “condition” has been defined or recognized.⁴⁵ Reference to the psychological effects of victimization by an intimate partner as a “syndrome” also suggests that victims suffer from a malady or pathology that somehow caused or contributed to their victimization.⁴⁶ The term has created additional confusion because it has been used to refer to the dynamics of battering relationships as well as the psychological and behavioral effects on victims.⁴⁷

Early research linked “battered woman’s syndrome” with the psychological concept of “learned helplessness” in an effort to explain victims’ inability to protect themselves against their batterers’ violence. More current research, however, disproves the connection between victim behavior and “learned helplessness,” and has instead documented that battered women typically engage in both active and passive efforts to escape, avoid, and resist the violence directed at them.⁴⁸ In fact, it is usually these very efforts that have given rise to the criminal charges pending against them.

Thus, an expert testifying for the defense in a case involving domestic violence is not expected to answer or address the question “Does the defendant suffer from battered woman’s syndrome?” When that question is posed within the criminal justice system, it is usually a challenge to whether any real, or significant, violence was directed at the defendant by her partner, or alternatively, whether the defendant is a victim deserving of mercy or leniency, *i.e.*, a “good” victim as opposed to a “bad” victim.⁴⁹ The stereotypic images of the good and bad victims of domestic violence typically fall out along racial and socioeconomic lines, with white, middle class women favored, and women of color who are poor less likely to fit the stereotypic image of the “battered woman.”⁵⁰

General testimony by an expert regarding the state of scientific and clinical knowledge of battering relationships can typically work to dispel the stereotypes that may hinder the judge or jury from evaluating testimony about the violence in the relationship. In addition, the expert may also

⁴⁵ *Impact of Evidence*, *supra* note 4, at 4.

⁴⁶ *See Validity*, *supra* note 16, at 19.

⁴⁷ *Impact of Evidence*, *supra* note 4, at 4.

⁴⁸ *Id.* at 18.

⁴⁹ *Id.* at 5.

⁵⁰ *See Moore, Shelby A.D., Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 How. L.J. 297, 339-346 (1995).

review and testify about the specific facts of the case, linking those facts with the empirical data about domestic violence that is known within the social science community, and offer expert opinions about the issues presented in the case.

B. General Testimony

An expert witness can testify generally about information and data known within the scientific and clinical psychological community about battering and its effects, based on the expert's familiarity with empirical studies and other literature in this specialized field. This testimony would typically include a discussion of the social context in which the abuse occurred, including the lack of effective community constraints on abuse, the inadequacy of police response, the risks for victims and their children upon leaving their homes.⁵¹ In addition, the expert may describe various components and patterns of violence and abuse that have been observed and documented and the responses typically produced among victims. The expert may place domestic violence victimization within the broader psychological context of trauma studies, describing the effects of a traumatic event, such as an assault or threat of assault by one's intimate partner, on a victim's state of mind.⁵²

1. **Enhanced Ability to Assess Dangerousness.** An example of such an effect, relevant in self-defense and duress cases, is a victim's enhanced ability to appraise the dangerousness of a potentially threatening situation. As recent studies have documented, prior episodes of violence inform victims of the behavioral cues that signal the onset of violence on a subsequent occasion.⁵³ Subtle gestures or changes in demeanor can be accurately assessed as dangerous by a victim who has experience with the meaning of similar behavior in the past. Nuances that would escape observation by strangers may have significant impact on a prior victim's state of mind, generating anxiety, fear, psychological arousal or hyper arousal, and causing the victim to take steps to avoid or alter the situation.⁵⁴

Changes in the abusive partner's behavior may also trigger a perception of danger, for example, when an abusive partner has previously responded to a separation by expressing remorse and pursuing reconciliation, and then in a subsequent separation abandons efforts to reconcile and becomes menacing, his victim may understand that change as signaling a much greater level of dangerousness. In a self-defense or duress case, the expert must be able to explain the

⁵¹ See Schuller, Regina A., & Hastings, Patricia A., *Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Evidence*, 20 LAW AND HUMAN BEHAVIOR 171(1996).

⁵² See Dutton, M., and Goodman, L., *Posttraumatic Stress Disorder Among Battered Women: Analysis of Legal Implications*, 12 BEHAVIORAL SCIENCES AND THE LAW 215 (1994).

⁵³ See *Validity*, *supra* note 16, at 7-10 (citing recent psychological literature on threat behavior and its assessment by trauma victims).

⁵⁴ *Id.* at 8.

significance of a prior history of abuse in enhancing a victim's ability to assess the dangerousness of her situation.

2. **Timing of Threats and Threatening Behaviors.** An expert may also need to explore the effect of timing on a victim's state of mind in cases in which the immediacy of threatening behavior is at issue. One pattern of coercion in a battering relationship includes the batterer's threats to kill or seriously injure the victim in the future if she fails to obey the batterer's directives by, for instance, revealing her abuse to others, separating or pursuing divorce, contesting the terms of a divorce, or becoming involved in another relationship. When made, the threat is not that immediate harm will result; but, if and when those later events materialize, the victim may perceive that she has become highly vulnerable to being killed or seriously harmed by her batterer. The passage of time may heighten the stress or fear associated with the threat, as the anticipation builds, and any renewed indication of the batterer's intention to harm her is likely to trigger an intense and possibly overwhelming sense of immediate danger.⁵⁵ In cases in which the issue is whether the defendant reasonably perceived an immediate threat, the effect on a victim's state of mind of various timing considerations must be thoroughly explored in the expert's testimony.

3. **Psychological Effects of Victimization.** A number of other exceptional psychological effects have been observed in battering victims, which if presented without the benefit of expert explanation as to their context, may create an impression of culpability or diminish the victim's credibility in the eyes of a judge or jury. For instance, many victims experience dissociative or amnesic states surrounding violent incidents, causing them to be unable to remember the events or their sequence.⁵⁶ They may exhibit a generalized flattening of affect, or feelings of guilt or shame, or outbursts of hostility or anger; they may maintain a state of heightened physiological or psychological arousal in the form of hyper vigilance, irritability, nervousness, or sleep difficulty, or alternatively, remain incapable of dealing with any thoughts or emotions associated with their trauma, to the point of failing to participate in their own defense.⁵⁷

A wide range of other coping mechanisms may be present, or may have been present at various times during the relationship, including the use of drugs or alcohol, or chronic or acute depression. Some of these responses may have diminished if the relationship has ended, and others may be exacerbated by the termination of the relationship.⁵⁸ An expert's testimony must place these psychological phenomena into their proper context for the judge or jury so that the factfinder may accurately assess the victim's role in the events underlying the criminal charges against her.

⁵⁵ *Id.* at 9.

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* at 10-12.

⁵⁸ *Id.* at 13.

4. **Dispelling Stereotypes.** Finally, the expert's testimony should work to dispel the misconceptions that abound about batterers, victims, and violent relationships. Many of the stereotypes tend to create an impression that the violence that was experienced in the relationship was not serious or that the battered woman was at least in part responsible for the violence.⁵⁹ For example, the failure of a battered woman to terminate the abusive relationship, or to report the abuse or participate in the prosecution of the batterer, may be misinterpreted as indicating that the abuse was not serious or that she is now strategically exaggerating its severity.⁶⁰

An expert witness can explain the seriousness of prior failures of the police or other authorities to intervene to stop the violence, or the reasonableness of the victim's belief that the authorities either can't or won't protect her. In addition, the mistaken belief that domestic violence victims are, or should be, helpless and passive may cause the factfinder to condemn any active resistance by the victim, particularly any use of physical aggression.⁶¹

It is also common for battered women to remain with, or at least in contact with, their batterer in order to gauge the level of his dangerousness, and to be in a position to soothe or assuage him, or to otherwise protect herself or her children, if and when the danger escalates.⁶² A misunderstanding of these and other behavioral responses by victims, if not corrected by an expert witness, can cause the factfinder to question the victim's claim that she was in fear of her batterer.

The range of patterns and responses to domestic violence are complex and varied, and knowledge within this field, as elsewhere, is continually evolving and changing.⁶³ Ongoing studies and clinical data provide new observations and empirical research findings in the social science disciplines, including psychology, psychiatry, sociology, nursing, and criminal justice. Experts who testify with authority from these fields can be valuable in providing context for the issues that are under consideration in criminal proceedings against a battered woman.

⁵⁹ See *Validity*, *supra* note 16, at 13.

⁶⁰ *Id.* at 14-15.

⁶¹ *Id.* at 15-16.

⁶² *Id.* at 16.

⁶³ See *Impact of Evidence*, *supra* note 4, at 5-6. As stated in the report, "The effects of violence on battered women, like trauma victims generally, vary based on characteristics of the violence (e.g., type, severity, chronicity, patterning), of the recovery environment (e.g., socioeconomic conditions, social support, community response), and of the individual (e.g., prior history of victimization, coping style). Thus, there is no single effect or set of effects that characterize all battered women; there is a range of effects demonstrated in the literature characteristic of trauma victims, including battered women." *Id.* at 5.

B. Case Specific Testimony

If an expert is engaged to provide case-specific testimony, he or she will need to review the facts of the case, by interviewing the client and other important witnesses, performing any appropriate psychological tests, and examining statements and documentary and physical evidence. The attorney should carefully think through, collect, review, and transmit any pertinent materials, with an awareness that any materials reviewed by the expert in forming an opinion are admissible at trial, regardless of whether they would otherwise be admissible.⁶⁴

With this information, the expert is in a position to evaluate the facts, and offer expert opinion, with respect to the legal issues in the case, which will differ depending on the defense presented, the theory of the case, and the facts of the case.

1. Self-Defense Cases.

a. **Proportionality.** An expert may review the particular cues that batterer gave to the defendant, which interpreted in light of her history of abuse, made her able to determine that the threatened force at the time of the offense was deadly, or that the defendant's force was otherwise proportional to the threatened force. The expert may explore the reasons that resort to a weapon was necessary to offset the threatened force.

b. **Immediacy.** The expert may opine as to how the defendant's history of abuse informed her understanding of the immediacy of her danger at the time of the offense and how the timing of the events affected the defendant's perception of danger, for instance how a period of anticipation may have heightened her fear in light of her knowledge that harm was inevitable based on past abuse. An expert could address whether the abuser's threat remained in play during a lull in the violence, justifying the defendant's right to pursue her attacker.

c. **Duty to Retreat.** The expert may offer an opinion as to why, based on the defendant's history of abuse, retreat would not have been effective in light of the particular pattern of abuse present in the case. The expert can offer information regarding lack of options, or the defendant's perception of lack of options, to retreat to, especially when killing occurs in home shared by defendant and abuser, to address cohabitation issue.

d. **Reasonableness.** The expert's testimony may address the objective reasonableness of the defendant's subjective belief that deadly force was immediately necessary for self-defense by presenting the situation from the defendant's perspective. What would an ordinary and prudent woman in the defendant's circumstances believe was immediately necessary to protect herself?

⁶⁴ See *Swails v. State*, 986 S.W.2d at 43-45.

2. **Insanity.**

a. **Severe Mental Disease or Defect.** The expert may opine that the effects of trauma on the psychological functioning of the defendant constituted a severe mental disease or defect. The expert may explore the cumulative effects of long-term terror, based on the particular characteristics of the abuse suffered by the defendant, which may include torture, high degrees of pain, isolation, sleep deprivation, severe humiliation or degradation, explaining the severity with which such traumas impair mental capacity.

b. **Defendant's Knowledge of Wrongfulness.** The expert may offer an opinion as to whether, at the time of the offense, the defendant knew that her conduct was wrong. If, based on the history of abuse, the defendant was in a state of terror, acting in self-preservation, under a trauma-induced psychological state.

3. **Voluntary Manslaughter or "Sudden Passion."**

a. **Provocation.** The expert may explore the nature of the provocation by the abuser—how the threatening behavior would reasonably be interpreted by the defendant in light of her history of abuse.

b. **Passion.** The expert may analyze the emotional response, or level of terror, that the abuser's threatening conduct produced in the defendant, based on her history with him and offer an opinion as to whether such terror would render a person of "ordinary temper" incapable of "cool reflection."

c. **"Sudden."** The expert may address the temporal relationship between the threatening or provoking conduct by the abuser and the emotional response, typically terror, elicited in the defendant. The expert may separate out for the jury the defendant's "generalized fear" from the immediate or sudden terror elicited near in time to the offense.

4. **Duress.**

a. **Present Threat.** The expert may assess whether the abuser's words or conduct conveyed a present threat of imminent harm to the defendant based on an assessment of the particular behavior and its significance to the defendant in light of the history of abuse. If no specific threatening words at the time of the offense, the expert may offer an explanation of how the abuser's conduct under the circumstances conveyed a *present threat*. Separate the defendant's generalized fear of the abuser from the specific fear that she had of a specific threatened harm on this occasion.

b. **Seriousness of the Threatened Harm.** The expert may analyze whether the harm threatened by the batterer on the occasion was death or serious bodily injury, and how the defendant was able to make that assessment based on her history of prior physical beatings.

c. **Compulsion.** The expert may evaluate whether the defendant was compelled to commit the crime, based on her subjective understanding of the threat, and whether her subjective

compulsion was objectively reasonable. The expert's evaluation would include an analysis of the circumstances surrounding the offense, especially whether those circumstances would cause the defendant to react to the abuser's directives as if her life or safety depended on compliance. In addition, the expert may opine as to whether "a person of reasonable firmness" would similarly comply out of fear for their life or safety.

d. **Presence in the Compulsive Situation.** The expert may explain the circumstances suggesting that the defendant's presence in the compulsive situation was not intentional, knowing, or reckless. The testimony should include, if applicable, a discussion of prior history showing that escape from the abuser had previously been ineffective, that the abuser had cut off avenues of escape, and that flight at the time of the offense would not have been effective.

5. **Injury to a Child.**

a. **Subjective and Objective Belief that Efforts would have been Ineffective.** The expert may analyze the defendant's subjective belief that an effort by her to prevent the batterer from injuring the child would not have been effective, and the objective reasonableness of that belief.

b. **Specific Intent.** The expert may testify regarding the defendant's level of intent, specifically whether the defendant *intended* to cause or aggravate serious injury to the child by her failure to act or whether the defendant failed to act *knowing* that serious injury would result. The causes for the defendant's failure to act, *e.g.*, her failure to remove the child from the presence of the abuser, her failure to obtain immediate medical care.

C. **The Expert's Role at Various Stages of the Case.**

Experts may appear at different stages in the legal process, and requirements for the expert's role may differ depending on the stage. In addition to the grand jury, trial and sentencing stages, which are discussed below, experts have been influential on motions to dismiss, motions for new trial, on appeal, and in *habeas corpus* and clemency proceedings.⁶⁵

1. **Grand Jury.** Experts testimony has been increasingly useful in the charging stage of criminal cases involving battered woman defendants. Defense attorneys in different areas of Texas report that prosecutors have allowed defense counsel to present domestic violence experts before the grand jury in recent cases in which battered women have killed their abusive partners, resulting in no-bills on at least two occasions.⁶⁶ Similar dispositions have been reported in other

⁶⁵ See Schneider, Elizabeth, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RIGHTS LAW REPORTER 195, 205 & n.62 (1986); Blackman, Julie, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RIGHTS LAW REPORTER 227 (1986).

⁶⁶ Interviews with Eric Albritton, of Holmes, Albritton & Ward, L.L.P., Longview, Texas, and Robert Mims, of Tyler, Texas.

states as well.⁶⁷ In addition, it is at least worthy of exploration whether the prosecutor's decision to submit a case to the grand jury, and at what level, might be influenced by information from experts who can assist in the prosecutor in evaluating the case.⁶⁸

2. **Testifying in a Jury Trial.** Testifying before a jury, the expert serves to re-educate, to recount, and to model a detached but sympathetic response to the defendant's situation. Persons serving on juries come from the general population which in varying circumstances and degrees have had some exposure to conflict and violence within the family. Their ideas and impressions are likely to include, to some extent, inaccurate stereotypes of batterers and victims as well as common misunderstandings about the dynamics of violent relationships and the roles of the parties involved. The first purpose of the expert, particularly during testimony about domestic violence generally, is to re-educate the jury about intimate violence, dispelling the misunderstandings and stereotypes. Such "re-education" requires a fairly thorough knowledge of recent empirical studies and other literature regarding the subject matter, and also a hands-on, working knowledge of the effects of battering on victims.

When testifying about a specific case, the expert must recount the history of violence experienced by the defendant, and is likely to do so in a less emotional, more detached professional manner. This method of re-telling may allow those members of the jury, who are either numbed or overwhelmed with the difficult emotional content, to assimilate this information. The expert's placement of the client's history within patterns that are regularly encountered in violent relationships may help the jury to embrace or at least understand what they might otherwise reject as unfathomable or unbelievable, in their effort to "make sense" of the facts with which they are being presented.

Finally, the effective expert should serve as a role model for the jurors as they analyze the defendant's conduct in their deliberations. Psychological studies regarding observers' reactions to victimization demonstrate that observers seek to protect themselves from the sense that they could be similarly victimized, and in their actions or interpretations attempt to restore the situation to accord with their perception of justice.⁶⁹ This is frequently manifested in the observers' blaming or otherwise derogating the victim, which serves to distance the observer from the victim and decrease the observer's sense of personal vulnerability. When observers are able to differentiate themselves from the victim in other ways, they are less likely to do so by blaming the defendant for her victimization.⁷⁰

⁶⁷ See Blackman, *supra* note 65, at 231-33.

⁶⁸ See *Impact of Evidence*, *supra* note 4, at 11.

⁶⁹ Blackman, J., *The Impact of Expert Testimony on Trials of Battered Women Who Kill Their Husbands*, 2 BEHAVIORAL SCIENCES AND THE LAW 413, 416 (1984).

⁷⁰ *Id.* at 416-417.

In the case of a jury reacting to a battered woman who has killed her abuser, it is possible and even likely that some individual jurors may solve this dilemma by viewing the homicide itself as having restored justice and vote for an acquittal. For others, the need to distance themselves from the defendant's victimization may be met in the expert's model of detachment as he or she analyzes the facts of the case. Jurors may be able to find a comfortable emotional distance from the defendant as they identify with the expert's detached but sympathetic view of her situation. And after becoming educated by a professional about the dynamics that created the defendant's situation, jurors may be comfortable assuming that more detached, professional perspective as they deliberate at the close of the evidence.

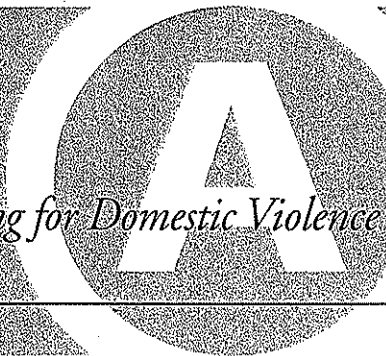
3. Sentencing.

With the move of sudden passion issues to the sentencing phase of trial, expert testimony at sentencing has taken on increased importance. It is possible for a judge to exclude expert testimony during the guilt/innocence phase, but allow the testimony during the punishment phase on the issue of sudden passion. Additionally, expert testimony regarding a history of abuse should serve as mitigation within the punishment range of any conviction and may also go to the issue of future dangerousness. An emphasis on the societal circumstances that led to the offense can be emphasized through expert testimony and urged to the fact finder in its determination of a just, legal response.

In sum, an expert witness can have a range of roles and responsibilities in working with defense attorneys on criminal cases involving battered women. Some of the more unique roles an expert can play in these cases may be in providing resources, particularly early in the case, as the client addresses her traumatic situation, and consulting with the defense attorney regarding fact development and analysis of defensive theories. The practical strategies required to ensure that a qualified expert's work is admissible must be determined by individual attorneys and is, of course, affected by local practice. Naturally, knowing the legal standards for admissibility is critical. But there are also sources an attorney can call to request advice and discuss strategy when appropriate, including the National Clearinghouse for the Defense of Battered Women in Philadelphia, Pennsylvania, and the National Jury Project, which has its midwest office in Minneapolis, Minnesota.

Using experts to their best advantage in the defense of battered women can make the difference between conviction and acquittal, or at least a reduction in punishment. It can even mean a no-bill from the grand jury, as some Texas attorneys have recently demonstrated. Ultimately, the attorney should find and engage the expert who has not only the appropriate credentials and experience, but also the ability to work with the attorney in a collaborative effort to achieve the best result possible for the client.

Appendix: Screening for Domestic Violence



SCREENING FOR DOMESTIC VIOLENCE

Most criminal defense attorneys have come into contact with clients who have been involved in a violent relationship, as either victim or abuser. When the client is a victim, the history of abuse may play a role in her defense. Many victims will refrain from volunteering information about their victimization to their attorneys due to, among other things, embarrassment, fear, or the belief that the abuse is not relevant to their legal representation. In order to represent a client effectively, it is essential to know whether violence exists so that all of the client's legal options may be explored.

Establishing and using a screening protocol for domestic violence is therefore necessary for any attorney who has regular contact with potential criminal defense clients. It is recommended that this domestic violence screening be included in the initial interview of *any prospective female client*. There is no reliable method for ascertaining whether a potential client is a victim of domestic violence without asking. Remember that domestic violence affects women from all socioeconomic and racial backgrounds.

Throughout the initial interview, the attorney should ask simple, direct questions in a nonjudgmental way that is directed at eliciting information about exposure to battering. To increase disclosure, such questions may be prefaced by an assurance that the information will be confidential, as well as the attorney's acknowledgment that questions are directed at personal information that may be difficult for the client to discuss. It may be helpful to begin with an opening statement, such as "Because abuse and violence is so common in women's lives, I have begun asking all of my clients the following questions because the answers may be important for their case."

Suggested Questions:

"Have you ever been hurt by your partner/spouse?"

"Are you afraid of your partner/spouse?" "Has he ever threatened you?"

"Has your partner/spouse ever used or threatened to use a weapon in your presence?"

"Has your partner/spouse ever hurt or scared your children or your pets?" "Has your home or any other property ever been damaged when your partner/spouse was angry?"

"Have you ever felt isolated?" "Does your partner/spouse prevent you from staying in touch with your family, friends, or neighbors?"

"Do you have access to your own money?" "Does your partner/spouse control the family finances?"

"Has your spouse/partner ever prevented you from leaving or separating?" "Have you ever tried to get a protective order against your spouse/partner?"

Questions to Avoid:

“Are you a victim of domestic violence?”

“Why did you stay?” “Why did you go back?”

“What did you do that made him so angry?”

If the answers indicate that some violence is present, discuss safety planning with the client and refer her to other resources in the community, such as shelters, counseling, or support groups. A safety planning pamphlet is attached for review and dissemination. Additional, open-ended questions will help identify other safety resources or referrals appropriate for the client’s situation: “What would help you feel safe?” “What are your fears?” “What can I do to help?”

If you determine that the abuse directly affects the representation of the client, you should begin conducting a full client interview regarding the background and details of the client’s abuse history as discussed in more detail in chapter three of the manual.

**CHECKLIST: WHAT YOU NEED TO
TAKE WHEN YOU LEAVE:**

✓ IDENTIFICATION:

Driver's License
Children's Birth Certificates
Your Own Birth Certificate
Social Security Card
Welfare Identification
HMO Card

✓ MONEY

Money and/or credit cards
ATM card
Bank Books
Savings Books
Checkbook

✓ LEGAL PAPERS

Your Protective Order
Lease, Rental Agreement, Deed to House
Car Registration & Insurance Papers
Health and Life Insurance Papers
Medical Records for You and Your Children
School Records
Work Permits/GREEN CARD, VISA
Passport
Divorce Papers
Custody Papers

✓ OTHER

House and Car Keys
Medications
Small objects to Sell
Jewelry
Address Book
Phone Card
Pictures of you, children & your abuser
Children's small toys
Toiletries/Diapers

**FOR MORE INFORMATION ABOUT
YOUR OPTIONS IN AUSTIN AND
TRAVIS COUNTY:**

POLICE & SHERIFF:

Emergencies	911
Austin Police Department	974-5000
APD Non-Emergency Report	356-4249
APD Victim Service	974-5037
Travis County Sheriff's Dept.	473-9285
Sheriff's Dept. Victim Services	473-9709

HOTLINES-24 HOUR

SafePlace-Domestic Violence (Voice/TDD)	928-9070
SafePlace-Sexual Assault (TDD 440-7363)	440-7273
First Call for Help	324-1899
National Domestic Violence Hotline	
	1-800-799-SAFE (7233)
	1-800-799-3224 (TDD)

Suicide Prevention	472-4357
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CHILD & ELDERLY ABUSE HOTLINE

1-800-252-5400

LEGAL SERVICES

Travis County Attorney's Office- Protective Order	473-9415
Domestic Violence Unit	473-9415
District's Attorney's Office	473-9400
Legal Aid of Central Texas	447-7707

Women's Advocacy Project

Family Violence Legal Line	
1-800-374-HOPE	
General Legal Information	
1-800-777-FAIR	
Lawyer Referral Svc.	372-8303
Municipal Court (Emergency Protective Orders)	
	433-4611

COUNSELING & SUPPORT SERVICES

SafePlace	928-9070
LifeWorks	478-1648
Alcoholic's Anonymous	451-3071
Family Violence Protection Team	206-3974



SafePlace

DOMESTIC VIOLENCE & SEXUAL ASSAULT SURVIVAL CENTER

PERSONAL SAFETY PLAN

**YOU HAVE THE RIGHT
TO BE SAFE!**

SafePlace

Domestic Violence and Sexual Assault
Survival Center

A merger of the Center for Battered Women
And the Austin Rape Crisis Center

Resource Administration: P. O. Box 19454,
Austin, Texas 78760

Telephone: 512-385-5181 TDD 482-0691

Domestic Violence 24-Hour Hotline:

512-928-9070 Voice TDD

Sexual Assault 24-Hour Hotline:

512-440-7273 TDD 440-7363



I. SAFETY DURING AN EXPLOSIVE INCIDENT

- A. If an argument seems unavoidable, try to have it in a room or area where you have access to an exit. Try to stay away from the bathroom, garage, and kitchen or near weapons or anywhere else where weapons might be available
- B. Practice how to get out of your home safely. Identify which doors, windows, elevator or stairwell would be best.
- C. Have a packed bag ready and keep it at a friend or relative's house in order to leave quickly.
- D. Identify a friend or neighbor you can tell about the violence and ask them to call 911 if they hear a disturbance coming from your house.
- E. Figure out a code word you can use with your children, friends and family to let them know when to call the police.
- F. Plan for where you will go if you have to leave home (even if you don't think you're going to need to.)
- G. Use your own judgment and feelings. If the situation is dangerous, consider giving the abuser what they want to calm them down. You have the right to protect yourself until you are out of danger.
- H. Always remember: **YOU DON'T DESERVE TO BE HIT OR THREATENED!!!**

II. SAFETY WHEN PREPARING TO LEAVE

- A. Open a savings account and/or get a credit card in your own name. Get your own post office box so that you can receive mail and checks.
- B. Leave money, an extra set of keys, copies of important papers and some extra medicine

and clothes with someone you can trust so you can leave quickly.

- C. Figure out who would be able to let you stay with them or lend you some money.
 - D. Call SafePlace for help in safety planning.
 - E. Keep SafePlace's Hotline Number, 928-9070, with you. Keep some change with you for emergency calls. Using a calling card is not safe.
- LEAVING A CONTROLLING PERSON IS THE MOST DANGEROUS TIME.**

III. SAFETY IN YOUR OWN HOME

- A. Change the locks on the doors as soon as possible. Buy additional locks for your windows - remember the patio door.
- B. Talk to your children about a safety plan when you are not with them.
- C. Tell your children's school or daycare about who has permission to pick up the children.
- D. Tell your neighbors and your landlord that your partner no longer lives with you and that they should call the police if they see your partner near your home.
- E. Never call your partner from your home. If they have Caller ID they will be able to locate you.

IV. SAFETY WITH A PROTECTIVE ORDER

- A. Keep your protective order with you at all times. When you change your purse that should be the thing that goes into it. Give a copy to a trusted friend or family member.
- B. Call the police immediately if your partner breaks the protective order.
- C. Think of ways to keep safe if the police don't come right away.
- D. Tell your family, friends, neighbors, co-workers, your landlord, and your health care provider that you have a protective order in effect.

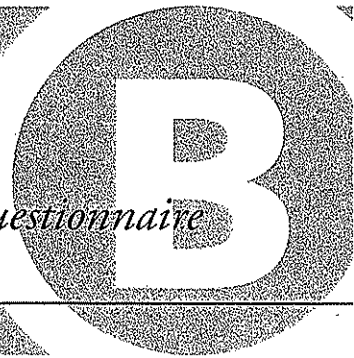
V. SAFETY ON THE JOB AND IN PUBLIC

- A. Decide which co-worker you can tell about your situation. You should include office or building security - provide a picture of your partner if you have one
- B. Arrange to have an answering machine, caller ID or get someone to screen your calls for you.
- C. Have a safety plan to use when you leave work. Ask someone to walk you to your car, bus or train. Use a different way to go home. Think of what you would do if something happened on the way home.

VI. YOUR SAFETY AND EMOTIONAL HEALTH

- A. If you are thinking about going back to your abusive partner talk to someone you trust first about another plan.
- B. If you have to communicate with your partner, figure out the safest way to do it.
- C. Have positive thoughts about yourself and be assertive with other people about what you need.
- D. Decide whom you can call to talk openly, and to give you the support you need.
- E. Plan to attend a women's or victims' support group for at least 2 weeks to gain support from others and learn more about the effects of abuse and control.

Appendix: Juror Questionnaire



JUROR QUESTIONNAIRE

The information on this questionnaire will remain confidential. Please answer all of the questions as completely and honestly as you can. Remember that you are under oath. As you answer the questions, please keep in mind that there are no "right" or "wrong" answers. Just read each question carefully and give an honest answer. You must not discuss your answers with any of the other jurors. If you need help, ask one of the clerks for assistance. Thank you for your cooperation.

1. Name _____

2. What city do you live in and how long have you lived there?

IF MINNEAPOLIS, what neighborhood? _____

3. Where did you grow up? _____

4. Where else have you lived? (List city, state, and length of residence).

5. What is your current status? *[Check one]*

_____ Single (never married)

_____ Living with a partner for _____ years

_____ Married for _____ years

_____ Divorced for _____ years; married for _____ years

_____ Widowed for _____ years; married for _____ years

How many times have you been married? _____

Current or last spouse/partner's occupation: _____

His/Her employer: _____

His/Her last grade level completed in school: _____

If more than high school, list his/her major areas of study or special training:

6. What is the highest grade or degree you completed in school, including any trade or technical school?

List any high school, college or vocational school you attended:

<u>Name of School</u>	<u>Major/Type of Training</u>	<u>Number of Years Attended</u>	<u>Degrees or Certificates</u>

7. Which of the following best describes your type of residence?

____ Own ____ Rent ____ Live with others

8. Do you have any children? ____ Yes No ____

IF YES, how many? _____

9. Please state the age, sex, and the occupation (current or last) of each person in your home:

9. What are/were your parents' occupations?

Mother: _____ Father: _____

10. Are you (CHECK ALL THAT APPLY)

Employed full time ()	Employed at more than one job ()
Employed part time ()	Temporarily laid off ()
Unemployed ()	Retired ()
Homemaker ()	Disabled () Student ()

Other (please specify): _____

11. List your current occupation and briefly describe your duties: _____

12. How long have you worked at this job? _____

13. What other types of jobs have you had in the last 10 years:

14. Have any of your jobs involved supervisory responsibilities? ____ Yes No ____

IF YES, how many people did you supervise? _____

15. Have you or anyone close to you ever taken **any courses or training** in or **worked** in any of the following occupations or fields:

LAW: lawyer, judge, legal secretary, law office, court clerk,
court reporter, etc. ____ Yes No ____

LAW ENFORCEMENT or CRIMINOLOGY: police officer,
highway patrol, FBI, sheriff, corrections, state crime bureau,
security, etc. ____ Yes No ____

MENTAL HEALTH: social work, psychiatry, psychology,
counseling, social work, etc. ____ Yes No ____

CHEMICAL DEPENDENCY: someone who works with
people who are dependent on alcohol or drugs ____ Yes No ____

IF YES TO ANY OF THE ABOVE, please explain whether this is yourself, a
relative or friend, courses or job held and dates of employment:

16. Have you ever served in the military? _____ Yes No _____

IF YES: List branch, rank at discharge, place and date of service, and any involvement with the offices of Military Police or Judge Advocate:

17. What newspapers and magazines do you read regularly? _____

18. What television shows do you watch regularly? _____

19. What radio programs do you listen to regularly? _____

20. Do you participate in any clubs, committees, or organizations, such as: veterans groups, service clubs, professional organizations, educational or political groups?

_____ Yes No _____

IF YES, please describe: _____

21. Do you do any volunteer work? _____ Yes No _____

IF YES, please describe: _____

22. Have you or any member of your family ever:

- | | | | | | |
|----|---|-------|-----|----|-------|
| a. | Owned a gun? | _____ | Yes | No | _____ |
| b. | Worked in any type of employment which
required carrying or using a gun? | _____ | Yes | No | _____ |
| c. | Shot a gun or been present when a gun was shot? | _____ | Yes | No | _____ |
| d. | Been shot? | _____ | Yes | No | _____ |

IF YES, please explain: _____

23. What are your feelings about gun control? _____

24. Have you or anyone close to you, ever:

- | | | | | |
|-------------------------------|-------|-----|----|-------|
| been a witness in court | _____ | Yes | No | _____ |
| sued someone else | _____ | Yes | No | _____ |
| been sued by someone else | _____ | Yes | No | _____ |
| been charged with a crime | _____ | Yes | No | _____ |
| been convicted of a crime | _____ | Yes | No | _____ |
| made a charge against someone | _____ | Yes | No | _____ |
| given a sworn legal statement | _____ | Yes | No | _____ |

IF YES to any of the above, please explain whether this was yourself, a relative or friend, and what happened **for each occurrence**:

25. Have you known anyone who died a violent death? _____ Yes No _____

IF YES, please explain: _____

26. Have **you or anyone you know** ever been physically beaten, assaulted or abused by a stranger, family member or acquaintance? _____ Yes No _____

IF YES, please explain the relationship to you of the person who was battered, any injuries you received, the relationship of the batterer to the victim, and whether the battering was reported to anyone:

27. Have **you** ever been **threatened** with physical violence or abuse? _____ Yes No _____

IF YES, please explain: _____

28. Have you ever **suspected** that **someone you know** has been physically beaten, assaulted or abused? _____ Yes No _____

IF YES, please explain your answer: _____

29. Have you or anyone close to you **ever been accused** of assault or domestic abuse? _____ Yes No _____

IF YES, please describe: _____

30. Have you or anyone close to you ever been the victim of a crime, such as a robbery, a burglary or theft, or any other crime, other than in the above questions? _____ Yes No _____

IF YES, please describe: _____

31. Have you ever had a job where you were required to report signs of physical or sexual abuse? _____ Yes No _____

IF YES, did you ever report any signs of physical or sexual abuse? _____ Yes No _____

32. Have you or anyone close to you ever contributed money or time to an organization concerned with violence against women, such as a women's shelter or hotline? _____ Yes No _____

IF YES, please explain: _____

33. Have you ever contributed money or time to an organization concerned with men's rights in divorce and custody disputes? _____ Yes No _____

IF YES, please describe the organization: _____

34. Do you have any **other experience with, or opinions about, domestic violence** not mentioned in your answers to the questions above?

IF YES, please describe: _____

35. Do you drink alcohol? _____ Yes No _____

IF YOU DO NOT DRINK ALCOHOL:

a. Did you ever drink in the past? _____ Yes No _____

b. Why did you quit? _____

c. Did you go to treatment to quit? _____ Yes No _____

d. What do you think of other people drinking alcohol? _____

36. Do you have any family members or close friends who have had a serious problem with drinking? _____ Yes No _____

IF YES, please explain, including whether they have had treatment for this problem:

37. Have you or anyone you know ever belonged to or donated time, money or services to any organization that deals with alcohol abuse or opposes drinking under certain conditions, like Mothers Against Drunk Driving (MADD)? _____ Yes No _____

IF YES, please explain: _____

38. Have you ever served on a jury? _____ Yes No _____

IF YES, please answer the following:

<u>Year</u>	<u>Type of Case</u>	<u>Description</u>	<u>Outcome</u>
_____	<input type="checkbox"/> Criminal <input type="checkbox"/> Civil	_____	_____
_____	<input type="checkbox"/> Criminal <input type="checkbox"/> Civil	_____	_____

Were you ever the foreperson? _____ Yes No _____

Was this experience: positive _____, negative _____, or mixed _____?

39. What criminal cases have you been following in the media?

40. Do you have any concerns or complaints about the criminal justice system?

____ Yes No ____

IF YES, briefly explain: _____

41. This case has received some news coverage. In _____, 19____, [Defendant] was charged with the shooting death of her husband, _____. [Defendant] claims that she shot her husband in self defense.

Did you see or hear any news reports about this case on the radio, TV, or in the newspapers? _____ Yes No ____

Have you heard anyone talking about this case? _____ Yes No ____

What stands out in your mind about what you have read or heard about this case?

42. Do you know anyone who has any information about this case or who is connected in any way to the people involved in this case?

____ Yes No ____

IF YES, please explain: _____

43. Is there anything about the **nature of this case** which would make it difficult for you to serve as a juror? _____ Yes No ____

IF YES, briefly explain: _____

44. Do you have any **religious or philosophical beliefs** that would make it difficult for you to be a juror on this case? _____ Yes No _____

IF YES, please describe: _____

45. Is there anything else the judge and attorneys should know about you or your opinions in regard to serving on a case involving issues of: _____?

_____ Yes No _____

IF YES, please explain: _____

I affirm, under penalty of perjury, that I have given complete and honest answers to all of the questions above.

Signature

Date

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Appendix: Sample Voir Dire Questions



SAMPLE VOIR DIRE QUESTIONS

National Jury Project

Jeremy Rose

Susie Macpherson

Diane Wiley

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PRETRIAL NEWS COVERAGE

1. There was news coverage about this case when it happened last summer.

This case involves a situation where

Do you remember hearing about this case on the news or from someone you know?

Did you hear about this on TV? Newspaper? Radio?

Did you hear or read about it more than once?

When did you first hear about it?

What do you remember reading or hearing about it?

What was your reaction when you first heard about it?

What did the other articles/programs say?

Please just tell us what you remember reading or seeing on TV?

2. **What stands out in your mind** about what you read or heard?

What else do you remember?

What **impressions** did you get about this case from what you read or heard?

What went through your mind?

3. Have you ever heard anyone say anything about this case, make any kind of comment about it? Your spouse, friends, co-workers?

What reactions have you heard other people express about this case, or about any of the people involved?

4. Have you heard anyone say that [Defendant] was probably guilty?

What did you think when they said that? What did you say?

Did this person know any of the people connected with the case?

What kind of comments, if any, have you made about this situation?

5. Based on what you have heard or read, what impressions were you left with about what led to Mr. _____'s death?

6. **If I was a friend and we were talking and I hadn't heard about this case, so I asked you what the case was about, what would you tell me?**

7. Given what you have read or heard up to this point - what's your impression as to whether [Defendant] is guilty or not?

Why do you say that?

8. Have you heard anyone **talking about this case today** or have you discussed it yourself today?

9. When you first realized this was the case you might be a juror on, what did you think?

Do you want to serve as a juror on this case?

Why do you say that?

BATTERING

1. Have you ever read any articles or books about battering?

Could you please tell us what this article or book was about?

What newspaper or magazine did you read this in?

When was it written?

What did the article say about this issue?

What did you think about the author's conclusions?

Did this article talk about the effects of battering on a woman's attitudes towards herself or life in general?

2. Have you ever seen any TV programs about battering?

What did the program have to say about this issue?

What did you think were the program's conclusions?

- Did you agree with these conclusions?

- What did you think about them?

Did this program talk about the effects of battering on a woman's attitudes towards herself or life in general?

3. Have you ever known anyone who was battered?

What happened?

What was the woman's reaction?

How did this abuse affect her?

4. Has anyone ever told you they felt as if they were being "pushed to the brink" or some similar phrase?

How did this person describe their feelings?

BATTERED WOMEN

1. Do you feel that wife abuse (battering) is a problem in your community? Why? Why not?

Have you heard that this is a problem in some communities?

How common a problem do you think it is?

What do you know about this problem?

Do you think that battering is a personal problem which should be handled within the family?

Or do you think it's a problem which requires outside assistance?

Do you think that a man is ever justified in hitting his wife?

Do you think it is a husband's role to discipline his wife?

2. Do you think that use of physical force, such as hitting or shoving, is an assault when it happens between members of a family? Why? Why not?
3. Some people think that a woman who is beaten over and over again has only herself to blame. What do you think about that?
4. What sort of psychological effect do you think physical abuse would have on a woman?
5. Do (any of) you know any women who have been physically abused?

What happened?

What did you think about it?

6. Some people say that a woman has an obligation to stay with her husband no matter what, that marriage is sacred. What do you think?
7. Why do you think a woman might feel that she is unable to leave a situation where her husband is beating her?

8. Would you think a woman is to blame if she were to stay in a situation where her husband is beating her?
9. Do you think that there are any reasons why it might be difficult to leave such a situation?
10. Have you ever known a person who was unable to leave an unhappy marriage (or relationship)?

Why do you think that he/she was unable to leave?

What were your feelings about that situation?

11. Do you know anyone who has problems in their marriage?

Have they discussed that situation with you?

12. If a close friend was to confide in you that she had been physically abused by her husband, what would your reaction be?

DURESS DEFENSE

1. Are you aware that the law does not hold a person criminally responsible for his or her actions if he or she was under duress at the time of the acts?

Does this law make sense to you? Why or why not?

Do you think that we should have laws like this?

2. Have you heard of any cases where someone was claiming duress when they committed a crime?

What case or cases?

When you hear about a case where the defense is duress, what do you think of?

3. Some people feel that a defense like duress is merely an excuse that is used by lawyers to try to get their clients off. Have you ever heard anybody say something like this, that a defense like duress is only an excuse — or a technicality?

What was your reaction?

Have you ever thought this yourself?

4. Do you think that a person who is under duress should be held legally responsible in the same way as someone who was not under duress?

Do you think there are circumstances where a person is under such serious duress that the law should not treat them in the same way as someone who was under duress?

5. Do you think it is possible for someone to be under so much duress that they would be forced to do something they know is wrong?

Even to the point of killing?

6. As jurors you will not be asked to approve of [Defendant]'s actions, or to say that she was morally justified at the time. The question that you will have to answer is, was she under duress.

Jurors will have to look at what [Defendant]'s state of mind was at the time of the shooting. Do you have any feelings that someone who commits a crime should be found guilty no matter what her state of mind was?

7. We are not saying that [Defendant] is not morally responsible for her actions. That is not an issue for the courts to decide. One issue for the jury in this case is whether **legally** [Defendant] is guilty or not guilty because she was **under duress** at the time.

Do you have any religious or moral convictions that would make it impossible for you to find [Defendant] not guilty by reason of duress?

8. Given everything we've talked about, do you think that you are at all skeptical about [Defendant]'s defense that she was under duress and was forced to do the things she did?

What are you feeling skeptical about?

9. You probably know that in criminal cases the jury has to be convinced beyond a reasonable doubt that the defendant is guilty in order to convict him or her. In this case, the prosecutor must convince you **beyond a reasonable doubt** that [Defendant] was not acting while under duress.

If you believe that [Defendant] was under duress and in fear of her life -- then you must find her not guilty -- even if she did kill her husband. Does this make sense to you?

Does that seem like a technicality to you?

Are you having a hard time with this legal concept?

Tell us what you're thinking.

Given everything we've talked about, do you think you can be fair and listen to [Defendant]'s side of what happened and judge whether or not she was under duress at the time Mr. Pool was kidnaped and killed?

FEAR

1. Have you ever felt physically afraid of someone?

Have you ever been threatened by someone?

Have you ever known anyone who had been threatened or harmed by someone and was physically afraid of them?

What were the circumstances?

What did you do?

Did you think that the person might really hurt you or someone you care about?

Why?

Did you feel irrational at any point?

[JURORS WITH NO PERSONAL EXPERIENCES ABOVE:]

2. How do you react to fearful situations?

Can you think of a time when you were really afraid?

What happened?

How did being afraid affect you? How did you react?

Could you think things through clearly?

3. Do you think you could defend yourself if you had to?

4. Your job as jurors will be to look at what [Defendant]'s state of mind was at the time that all of this was going on -- whether she was under duress at the time she did the things she did.

Do you have any feelings that if someone is killed, the other person is guilty of murder, no matter what the circumstances were at the time?

5. We are not saying that [Defendant] is **not morally responsible** for her husband's death. She will have to live with that for the rest of her life. But morality is not an issue for the courts to decide. The issue for a jury in this case is whether **legally** [Defendant] is guilty of first or second degree murder or not guilty because she was under duress.

Do you have any religious or moral convictions *that would make it impossible* for you to find [Defendant] not guilty **even if** you believe she was under duress?

6. Some people feel that even though the person was under duress, they should still be considered legally guilty. They feel that since a life was lost, the person should be convicted of something. Given everything we've talked about, do you think that **you** are at all skeptical about the legal defense of duress?

SELF DEFENSE

1. In your own words, can you tell me what self-defense means to you?
2. What comes to mind when you hear the term self-defense?
3. Everyone has their own idea about what self-defense is. The judge will tell you what the law says, but I'm just interested in what you think self-defense means?
4. Do you think that shooting or killing another person can ever be justified?
5. Do you think that a person who shoots and kills another person should be punished for that act, no matter what the circumstances?
6. Have you ever been physically afraid of someone?
7. Have you ever thought you or someone you love might be killed?

IF YES: What happened?

What did you do?

8. If someone were hitting you, how would you defend yourself?
9. If you were attacked by someone much larger or stronger than yourself, do you feel you would be able to defend yourself?
10. Could you use a weapon in self-defense?
11. What if you were attacked by someone you knew. How do you think you would defend yourself?
12. Can you imagine a situation in which you might be in fear of your life or the life of someone you love?
13. Have you ever been frightened by a person who was acting crazy or irrational?

IF YES: What were the circumstances?

IF NO: How do you think you would deal with that sort of situation?

14. Are there any types of crime which you feel require stricter punishment than others?
15. Your job as jurors will be to look at what [Defendant]'s state of mind was at the time that she shot her husband. Do you have any feelings that person who shoots her husband is guilty, no matter what her state of mind was?

We are not saying that [Defendant] is not morally responsible for the death of her husband. That is not an issue for the courts to decide. The issue for a jury in this case is whether **legally** [Defendant] is guilty of murder, or not guilty because she was acting in self defense or the defense of another.

16. Do you have any religious or moral convictions that would make it impossible for you to find [Defendant] not guilty since she did shoot her husband?
17. Given everything we've talked about, do you think that you are at all skeptical about [Defendant]'s legal defense that she was acting in self defense?

What are you feeling skeptical about?

JUSTIFICATION / DUTY TO RETREAT

1. The law recognizes that there are certain circumstances where it is justified to kill someone. Do you personally feel that there are circumstances where it is justified to kill someone?

How will you deal with the fact that you disagree with the law on this?

2. The judge will tell you that the law states that a person is justified in using force to defend themselves or another against the threat of death or serious bodily harm, if their action seemed reasonable under the circumstances. Do you think you will be able to consider the circumstances from [Defendant]'s point of view?
3. The judge will tell you that the law states that there is no duty to retreat from one's own home when under attack. A person can stand and defend themselves. If you find that [Defendant] was in danger of death or serious harm and had a right to defend herself, could you acquit her if you thought there was some possibility of escape?
4. Do you understand that you are not being asked to approve of [Defendant]'s action, but only to decide whether or not she acted in self-defense?
5. If after hearing the evidence, you determine that [Defendant] acted in self-defense, could you vote for acquittal regardless of your own feelings about her having shot and killed someone?
6. How do you feel about [Defendant] knowing that she is on trial for murder?

Why is that?

7. Do you think that because [Defendant] was married to _____, it is unlikely that she was acting in self-defense?
8. The purpose of this trial is to determine whether or not she should be held criminally responsible for her husband's death, or be found not guilty by reason of self defense. We're not asking you to approve of [Defendant]'s actions. The entire situation was tragic - however the issue is whether she is to be held criminally responsible.

Given everything we've talked about, do you think you can be fair and listen to [Defendant]'s story as it is told to you by herself and the other witnesses and judge whether or not she was acting in self defense or the defense of others?

SLEEP / NO IMMEDIATE DANGER

1. Mr. _____ was asleep when he was shot. Knowing that, have you eliminated the possibility that [Defendant] may have been justified in trying to defend herself?

Would you refuse to consider whether [Defendant] was justified in trying to defend herself, knowing that her husband was asleep at the time?

Would that automatically mean in your mind that it was not self-defense?

LEGAL PRINCIPLES

[Defendant] has pled not guilty to the charge of murder.

1. The purpose of this trial is to determine whether the prosecutor can prove beyond a reasonable doubt that [Defendant] is guilty of the charge against her.

I assume that most everybody has heard that phrase before, beyond a reasonable doubt?

How important is this to you, that the prosecutor should have to prove that someone is guilty beyond a reasonable doubt?

Why?

2. How closely did you follow the O.J. trial?

A lot of people felt very cynical and skeptical about the system after the O.J. trial - others felt that the system worked as it should. How did you feel?

3. We've already talked about how in our legal system, a person who is accused of something is presumed innocent **unless** the prosecutor can prove that she is guilty beyond a reasonable doubt.

Do you think that [Defendant] has to prove her innocence?

Why do you say that?

4. From what you know about the case so far, is there anything that would make it difficult for you to presume that [Defendant] is innocent of murder at this time?

Can you consider her innocent?

5. **Do you understand that this means that the prosecutor and [Defendant] do not start out even.** [Defendant] is presumed innocent and the prosecutor has to prove that she is guilty beyond a reasonable doubt. Do you have any problem with this?

6. It will be your job to wait until the end of **all** of the evidence before you decide whether or not the prosecutor has proved beyond a reasonable doubt that [Defendant] is guilty of murder or whether she was acting under duress. You cannot have preconceived notions before you have heard all of the evidence.

Can you do that?

7. In the end, the jury must reach a unanimous decision, that is, you will all have to agree about the verdict. This might be hard for some jurors, because they might disagree with the others. We don't want you to be stubborn, we want you all to discuss the evidence with each other, and listen to each other. However, in the end, you may find that you disagree with everyone else.

What do you think you would do if you were the only juror who felt a certain way and everyone else disagreed?

Have you ever been in that kind of situation before, where you disagreed with a number of people?

Do you think you could stick to your guns about your decision?

8. Which do you think is worse, that a guilty person should be found not guilty, or that an innocent person would be convicted? Why do you say that?
9. This is probably going to be one of the most important decisions you make in your life. It is going to be really important that you be able to be open-minded and listen to **all** of the evidence, not jump to a conclusion after the first few witnesses.

The prosecution goes first here, and his witnesses will be testifying first, then we will have a chance to put on witnesses. Can you not jump to any conclusions before you hear all of the evidence?

10. Do you think you are the kind of person who can decide this case fairly after hearing **all** the evidence - a person who can listen to what the law is as the judge gives it to you, and decide for yourself what the facts are, and finally, arrive at a verdict which is consistent with the evidence, consistent with the law, and consistent with your own conscience?



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